No. 87-5002-ASY
Status: GRANTED

Title: Ellis T. McCoy, etc. Appellant
v.
Court of Appeals of Wisconsin, District 1

Docketed:
May 22, 1987

Court: Supreme Court of Wisconsin

Counsel for appellant: Butler,Louis B.

Counsel for appellee: Rice,David

Entry	Date	Note	Proceedings and Orders
1	May 22 1987	G	Statement as to jurisdiction and motion for leave to proceed in forma pauperis filed.
3	Jul 15 1987		Motion of appellee Wisconson (Printed) to dismiss or affirm filed.
4	Jul 16 1987		DISTRIBUTED. September 28, 1987
6	Oct 5 1987		PROBABLE JURISDICTION NOTED.
			**********
7	Nov 16 1987		Brief of appellant Ellis T. McCoy filed.
8	Nov 16 1987		Brief amici curiae of Natl. Legal Aid and Defender Assn, et al. filed.
9	Nov 23 1987		SET FOR ARGUMENT. Wednesday, January 20, 1988. (2nd case).
10	Nov 30 1987		Joint appendix filed.
13	Dec 14 1987		CIRCULATED.
11	Dec 17 1987		Brief of appellee Wisconsin filed.
14	Jan 11 1988	X	Reply brief of appellant Ellis T. McCoy filed.

(2)

87-5002

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

STATE OF WISCONSIN, ex rel.
ELLIS T. McCOY,

Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

LOUIS BENNETT BUTLER, JR.
Assistant Wisconsin Public Defender

819 North Sixth Street, Room 821
Milwaukee, WI 53203
Telephone (414) 227-4891

Attorney for Appellant.

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MAY 22 1987
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SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

STATE OF WISCONSIN, ex rel.
ELLIS T. McCOY,

Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JURISDICTIONAL STATEMENT

QUESTION PRESENTED

Is Rule 809.32(1), Stats., unconstitutional to the extent that it requires a defendant in a criminal appeal to discuss in a no merit brief why the issue that might arguably support the appeal lacks merit?

PARTIES BELOW

The parties in the Supreme Court of Wisconsin were petitioner State of Wisconsin ex rel. Ellis T. McCoy, by Louis B. Butler, Jr., Assistant State Public Defender, Relator Ellis T. McCoy and the Wisconsin Court of Appeals, District I.

OPINIONS BELOW

The April 9, 1987, decision of the Wisconsin Supreme Court is reported as State of Wisconsin ex rel. Ellis T.

McCoy v. Wisconsin Court of Appeals, District I, 137 Wis. 2d 99, 403 N.W.2d 449 (1987). The text of the opinion is set out verbatim in Appendix A: 1-15, and the dissent is set forth at Appendix A: 15-19.

JURISDICTION

(i) Nature of the proceeding.

This is an appeal from an original action for declaratory judgment in the Wisconsin Supreme Court. The Wisconsin Court was called upon to consider the constitutionality of Rule 809.32(1), Stats. (1983-1984), which requires that appointed counsel, upon determining that a criminal appeal would be frivolous, submit a brief to the court of appeals which includes an explanation as to why any issues which might arguably support an appeal lack merit. Appellant alleged that the discussion requirement of why an appeal lacked merit violated relators rights to appeal, to due process on appeal, and to effective assistance of counsel on appeal. The Wisconsin Supreme Court, in a four to three decision, upheld the constitutionality of the discussion requirement of Rule 809.32(1), Stats.

(ii) Judgments below.

This was an original action for declaratory judgment accepted by the Wisconsin Supreme Court on March 27, 1986 (Appendix B). It arises, however, out of the related case of State of Wisconsin v. Ellis T. McCoy, Case No. 84-929-CR-NM. Mr. McCoy was convicted in Milwaukee County Circuit Court on December 2, 1983, of one count of second degree sexual assault, contrary to sec. 940.225(2)(a), and one count of abduction, contrary to sec. 940.32(1), Stats., the Honorable William A. Jennaro, presiding (Appendix C: 1). The decision

of the Wisconsin Supreme Court in this action was entered April 9, 1987.

(iii) Jurisdiction in this Court

Section 1257(2), Title 28, United States Code vests jurisdiction in this Court because the final judgment below upheld the validity of state statute and its application against claims that it is repugnant to the Constitution of the United States.

Cases which support jurisdiction over this appeal include Lathrop v. Donohue, 367 U.S. 820, 824 (1961); Reinman v. Little Rock, 237 U.S. 171, 176 (1915); Williams v. Bruffy, 96 U.S. 176, 183 (1878); King Manufacturing Co. v. Augusta, 277 U.S. 100, 107-112 (1928); Supreme Court of Virginia v. Consumers Union, 446 U.S. 719, 731 (1980); District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 485-86 (1983); Mosing v. Hagen, 33 Wis. 2d 636, 646-47, 148 N.W.2d 93 (1967); and In the Matter of E.B., 111 Wis. 2d 175, 181, 220 N.W.2d 584 (1983).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENTS TO THE UNITED STATES CONSTITUTION

ARTICLE VI

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE XIV

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WISCONSIN CONSTITUTION

ARTICLE I

Rights of Accused. SECTION 7. In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

Prosecutions; double jeopary; self-incrimination; bail; habeas corpus. SECTION 8. [As amended Nov. 1870 and April 1981] **(1)** No person may be held to answer for a criminal offense without due process of law, and no person for the same offense may be put twice in jeopardy of punishment, nor may be compelled in any criminal case to be a witness against himself or herself.

Rights of suitors. SECTION 21. [As amended April 1977] **(1)** Writs of error shall never be prohibited, and shall be issued by such courts as the legislature designates by law.

(2) In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice. [1975 J.R. 13, 1977 J.R. 7, vote April 1977]

STATUTES AND COURT RULES INVOLVED

808.03 (1983-84) Appeals to the court of appeals. **(1)** APPEALS AS OF RIGHT. A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order entered in accordance with s. 806.06(1)(b) or 807.11(2) or a disposition recorded in docket entries in traffic regulation cases and municipal ordinance violation cases prosecuted in circuit court which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

....

809.30 (1983-84) Rule (Appeals in felony cases). **(1)** APPEAL OR POSTCONVICTION MOTION BY DEFENDANT. (a) An appeal or motion for postconviction relief by a defendant in a felony case must be taken in accordance with this subsection.

(b) The trial judge shall inform the defendant at the time of sentencing or imposition of a fine or probation of the right to appeal or seek other postconviction relief, the time limits on seeking the relief and, if indigent, the right to publicly compensated counsel in those proceedings.

(c) If the defendant claims or appears to be indigent and wishes to have publicly compensated counsel to represent the defendant in seeking postconviction relief, the defendant shall notify the state public defender within 45 days of the date of sentencing or imposition of fine or probation. The state public defender shall within 60 days of notification by the defendant determine the defendant's indigency and appoint counsel as provided in ch. 977, and at the same time shall request the court reporter to prepare the transcript of notes of the proceedings in the case.

....

809.32 (1983-84) Rule (No merit reports) (1) If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. Calfornia, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service.

(2) The attorney shall file in the trial court a notice of appeal of the judgment of conviction and of any order denying a postconviction motion. The clerk of the trial court shall transmit the record in the case to the court pursuant to s. 809.15. The no merit brief and notice of appeal must be filed within 180 days of the service upon the defendant of the transcript under s. 809.30(1)(e).

(3) In the event the court of appeals finds that further appellate proceedings would be frivolous and without any arguable merit, the court of appeals shall affirm the judgment of conviction and the denial of any postconviction motion and relieve the attorney of further responsibility in the case. The attorney shall advise the defendant of the right to file a petition for review to the supreme court under s. 809.62.

(4) If a fully briefed appeal is taken to the court of appeals and the attorney is of the

opinion that a petition for review in the supreme court under s. 809.62 would be frivolous and without any arguable merit, the attorney shall advise the defendant of the reasons for this opinion and that the defendant has the right to file a petition for review. If requested by the defendant, the attorney shall file a petition satisfying the requirements of s. 809.62(2)(d) and (f) and the defendant shall file a supplemental petition satisfying the requirements of s. 809.62(2)(a), (b), (c) and (e). The petition and supplemental petition shall both be filed within 30 days of the day of the decision of the court of appeals. An opposing party may file a response to the petition and supplemental petition within 10 days of the service of the supplemental petition.

967.06 (1983-84) Determination of Indigency; appointment of counsel; preparation of record. As soon as practicable after a person has been detained or arrested in connection with any offense which is punishable by incarceration, or in connection with any civil commitment proceeding, or in any other situation in which a person is entitled to counsel regardless of ability to pay under the constitution or laws of the United States or this state, the person shall be informed of his or her right to counsel. Persons who indicate at any time that they wish to be represented by a lawyer, and who claim that they are not able to pay in full for a lawyer's services, shall immediately be permitted to contact the authority for indigency determinations specified unders. 977.07(1). The authority for indigency determination in each county shall have daily telephone access to the county jail in order to identify all persons who are being held in jail. The jail personnel shall provide by phone information requested by the authority. In any case in which the state public defender provides representation to an indigent person, the public defender may request that the applicable court reporter or clerk of courts prepare and transmit any transcript or court record. The request shall be complied with. The county treasurer shall compensate the court reporter or clerk of courts for the preparation and transmittal of the documents, upon the written statement of the state public defender that the documents were required in order to provide representation to the indigent person.

STATEMENT OF THE CASE

This was an original action before the Wisconsin Supreme Court. It arises, however, out of the case State v. Ellis T. McCoy, No. 84-929-CR-NM. Mr. McCoy was convicted in Milwaukee County Circuit Court on December 2, 1983, of one

count of second degree sexual assault, contrary to sec. 940.225(2)(a), and one count of abduction, contrary to sec. 940.32(1), Stats., the Honorable William A. Jennaro presiding. Upon conviction, he was sentenced to six years, each count, to be served consecutively at the Dodge Correctional Institution at Waupun, Wisconsin.

The petitioner in the Wisconsin Supreme Court represents the relator, Ellis T. McCoy, in the case of State v. McCoy, No. 84-929-CR-NM, now pending in the Wisconsin Court of Appeals, District I. After doing research in preparation for filing the brief in that action, petitioner concluded that further appellate proceedings on behalf of Mr. McCoy would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967) and Rule 809.32(1). App. D: 1-2. Petitioner discussed the matter by telephone twice with Mr. McCoy, who was advised that his options included voluntarily dismissing the appeal, proceeding pro se or requiring the petitioner to file a no merit report. App. D: 2. Mr. McCoy opted for a no merit report. App. D: 2.

A motion was filed on behalf of Mr. McCoy before the court of appeals on August 14, 1984, to determine the constitutionality of Rule 809.32(1) and clarify the scope of petitioner's representation on appeal. App. D. The motion alleged that that portion of Rule 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on McCoy's Sixth Amendment right to counsel. App. D: 3-4.

The Wisconsin Court of Appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of

counsel. Consequently, no justiciable controversy exists involving the constitutionality issue." App. E: 1-2.

Petitioner filed a "no merit" brief on October 22, 1984, which was in compliance with Anders and the subsequent decision of Evitts v. Lucey, 469 U.S. 387, 394 (1985), but not in compliance with Rule 809.32(1). App. F. In an introduction to that brief, petitioner pointed out that the rule and Anders could not be reconciled, and that he was ethically obligated to protect his client's Sixth Amendment right to counsel on appeal pursuant to SCR 20.34(1)(c) and (2)(a) (1984). App. F: 4-7.

The court of appeals, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included. App. G. The court also ordered that petitioner file a new brief within fifteen (15) days of the date of that order which was in compliance with the Rule. App. G: 2.

Petitioner filed a petition for a supervisory writ of prohibition and declaration of relator's rights in the Wisconsin Supreme Court dated April 23, 1985. App. H: 1-7 [app. omitted]. The court, however, in an order dated May 8, 1985, ruled that petitioner was not entitled to a supervisory writ and declaratory relief from that court for the reason "that he has an adequate remedy in the court of appeals by renewing his motion for a determination of constitutionality of sec. (Rule) 809.32(1), Stats." App. I: 1-2.

Petitioner renewed his "Motion to Determine Constitutionality of Rule 809.32(1) and to Clarify Scope of Attorney's Representation on Appeal" in the court of appeals in a motion dated June 4, 1985. App. J: 1-7 [App. omitted]. The court of appeals once again denied petitioner's motion in

an order amended January 16, 1986, stating that the "constitutionality of sec. 809.32(1), Stats., must be determined by its supreme court authors and not by a court bound to obey what the court creates." App. K: 1-3. The court again directed petitioner to file a brief in compliance with Rule 809.32(2) within fifteen (15) days of the date of the order. App. K: 3.

Petitioner renewed his "Petition for Supervisory Writ of Prohibition and Declaration or Relator's Rights" in the Wisconsin Supreme Court on January 24, 1986. App. L: 1-8. The court granted the petition, insofar as it sought a declaratory judgment with respect to the constitutionality of Rule 809.32(1) in an order dated March 27, 1986. App. B: 1-2. The court also held the petition for a supervisory writ of prohibition in abeyance pending further order of the court. App. B: 2.

The Wisconsin Supreme Court, in a decision entered April 9, 1987, upheld the constitutionality of Rule 809.32(1). McCoy, *supra*; App. A. The court admitted that the Wisconsin no merit procedure goes beyond Anders and requires an attorney to file brief which includes a statement indicating why the appeal lacks merit. 137 Wis. 2d at 95; App. A: 6. The court, however, stated that "(w)hile Anders does not sanction the use of the discussion requirement, it does not proscribe it, either." 137 Wis. 2d at 97; App. A: 8. The court stated that "... we believe the rule requires an attorney to fulfill a duty that co-exists with the duty owed to the client -- that duty which is owed to the court. The court will be better equipped to make the correct decision about the potential merits of the appeal if it has before it not only the authorities which might favor an appeal, but also the authorities which might militate against it." 137 Wis.

2d at 100-101; App. A: 11-12. The court added, "… the discussion requirement serves as a significant administrative aid to the reviewing court.… Hence, the discussion requirement operates as a judicial aid, serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner." 137 Wis. 2d at 103; App. A: 14.

Three of the seven justices dissented on the ground that the no merit rule violates the defendant's Sixth Amendment right to effective assistance of counsel. 137 Wis. 2d at 104; App. A: 15. The dissent noted that "(c)ounsel's filing a brief setting forth arguments against the defendant's position is a task that benefits the court but not the client. Accordingly, such a task is more properly assigned to an *amicus curiae* than the advocate." 137 Wis. 2d at 106-107; App. A: 17-18).

THE QUESTION IS SUBSTANTIAL

This Court previously examined the role of appointed appellate counsel in Anders v. California, 386 U.S. 738 (1967). The Court in Anders ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client, as opposed to that of *amicus curiae*. 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed

to raise any points he chooses, "the court -- not counsel -- then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a non-indigent defendant is able to obtain.

Id. at 745.

The Wisconsin Supreme Court in the instant case recognizes that the procedure in Wisconsin under Rule 809.32(1) "… goes beyond Anders and requires that the attorney file a brief which … includes a statement indicating why the appeal lacks merit." 137 Wis. 2d at 95; App. A: 6. The substantial question presented is whether the Wisconsin rule deprives a criminal defendant of his rights to appeal,[1] to due process on appeal,[2] and to effective assistance of counsel on appeal,[3] contrary to the Sixth and Fourteenth Amendments to the United States Constitution.

One circuit of the United States Court of Appeals, in a decision published April 13, 1987, recently ruled that a criminal defendant was denied effective assistance of counsel when his apellate lawyer did exactly what the Wisconsin Supreme Court requires McCoy's appellate counsel to do. Robinson v. Black, 812 F.2d 1084 (8th Cir. 1987). The court concluded that "counsel did not act as an advocate when he

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1 Wisconsin law provides for an appeal as of right. Sec. 808.03 and Rule 809.30(1)(b); Art. I, sec. 21, Wis. Const.

2 Art. I, sec. 8, Wis. Const.

3 Art. I, sec. 7, Wis. Const.; Rule 809.30(1)(b) and sec. 967.06.

briefed all issues in favor of the government and concluded Robinson's claims were meritless. Robinson had a right to expect counsel to brief and argue his case to the best of counsel's ability showing the most favorable side of defendant's arguments. Counsel changed the adversarial process into an inquisitorial one by joining forces of the state and working against the client." *Id.*, at pp. 1086-87.

On the other hand, another circuit of the United States Court of Appeals came to the opposite conclusion and has held that a brief include a statement indicating why arguments ostensibly supporting an appeal are without merit. United States v. Edwards, 777 F.2d 364, 365-66 (7th Cir. 1985).

A number of state courts have interpreted Anders in a wide variety of ways, with some adopting alternative mechanisms for dealing with the difficult ethical dilemma at the heart of the case, either under their state constitutions or supervisory powers. *See, e.g.*, State v. Horine, 64 Or. App. 532, 669 P.2d 797 (Ct. App. 1983); State v. McKenney, 98 Idaho 551, 568 P.2d 1213 (1977); People v. Wende, 25 Cal.3d 436, 158 Cal. Rptr. 389, 600 P.2d 1071 (1979); Turner v. Haynes, 245 S.E.2d 629 (W.Va. 1978); State v. Varner, 692 P.2d 753 (Utah 1984); State v. Shattuck, 684 P.2d 154 (Ariz. 1984); State v. Duncan, 385 N.E.2d 323, 57 Ohio App.2d 93, 11 O.O. 3d 83 (Ohio App. 1978); State v. Allen, 99 N.J. Super. 314, 239 A.2d 675 (1968); Huguley v. State, 253 Ga. 709, 324 S.E.2d 729 (1985); State v. Gates, 466 S.W.2d 681 (Mo. 1971); State v. Lewis, 291 N.W.2d 735 (N.D. 1980); Ex parte Sturdivant, 460 So.2d 1210 (Ala. 1984), *on remand*, 460 So.2d 1213 (Ala. 1984); Commonwealth v. Moffett, 418 A.2d 585 (Mass. 1981); Eaton v. State, 660 P.2d 803 (Wyo. 1983); State v. Henderson, 425 S.W.2d 593 (Tenn. 1968); Smith v. State, 248 A.2d 146 (Del. 1968); Killingsworth v. State, 490 So.2d

849 (Miss 1986); Smith v. State, 496 So.2d 971 (Fla. App. 1986); Caraway v. Texas, 560 S.W.2d 690 (Tex. Crim. 1978); People v. Lowery, 86 A.D.2d 537, 445 N.Y.S.2d 992 (1982); Commonwealth v. McClendon, 495 Pa. 467, 434 A.2d 1185 (1981) and Dixon v. State, 152 Ind. App. 430, 284 N.E.2d 102 (1972). A review of these decisions clearly establishes that the judicial systems across the country have not been able to interpret Anders and evolve a uniform approach to appellate counsel's dilemma as to how to protect the client's appeal when counsel de ermines that the case lacks merit.

In addition, commentators have not only criticized Anders for creating a procedure that is impossible to follow, but have also pointed out that decisions purporting to interpret Anders are often inconsistent with Anders. *See, e.g.*, Pengilly, Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal, 9 Crim Jus. J. 45 (1986); and Hermann, Frivolous Criminal Appeals, 47 N.Y.U.L. Rev. 701 (1972). For example, Pengilly correctly points out that a decision which was heavily relied upon by the Wisconsin Supreme Court in the instant case, Nickols v. Gagnon, 454 F.2d 467 (7th Cir. 1971), is "... irreconcilable with the requirements of Anders" on at least two different points. 9 Crim. Just. J. at pp. 55-56. Indeed, Pengilly states that while the "Wisconsin" approach followed in Cleghorn v. State, 55 Wis. 2d 466, 198 N.W.2d 577 (1972) may uphold the Model Code of Professional Responsibility, it violated the strict mandate of Anders. *Id.*, at p. 55. And another commentator has stated that virtually the same brief is required whether assigned counsel supports the appeal or requests withdrawal. Mendelson, Frivolous Criminal Appeals: The Anders Brief or The Idaho Rule? 19 Crim. Law Bull. 22, 26-27 (1983). This view was

not shared by the Wisconsin Supreme Court in the instant case.

In light of the conflict between the Seventh and Eighth Circuits of the United States Court of Appeals, the difficulty with and lack of a uniform interpretation of Anders among the various states throughout the country, and the lack of agreement within the Wisconsin Supreme Court, appellant submits that the question presented is substantial and review is warranted. Appellant would also submit that appellate counsel should not disregard one of the binding but irreconcilable decisions without a clear indication that the McCoy procedure is acceptable under Anders. This Court should determine whether the Constitution allows appointed appellate counsel to provide reasons why a case lacks merit when no such indication exists in Anders.

CONCLUSION

In light of the foregoing, appellant respectfully requests that this Court note probable jurisdiction of this appeal and set this case for briefing and oral argument.

Respectfully submitted,

LOUIS BENNETT BUTLER, JR.
Assistant Wisconsin Public Defender

819 North Sixth Street, Room 821
Milwaukee, WI 53203
Telephone (414) 227-4891

Attorney for Appellant.

Dated May 20, 1987.

A P P E N D I X

STATE of Wisconsin EX REL. Ellis T. McCOY, Petitioner,

v.

WISCONSIN COURT OF APPEALS, DISTRICT 1, Respondent.

Supreme Court

No. 86-0172-W. Argued January 5, 1987.—Decided April 9, 1987.

Criminal Law and Procedure § 699.5*—appellate briefs—meritless appeals discussion rule—constitutionality.

Statute requiring that appointed counsel, upon determining that criminal appeal would be frivolous, submit brief to court of appeals which includes explanations as to why issues which might arguably support appeal lack merit, is not unconstitutional, since rule does not require attorney to engage in protracted argument in favor of that conclusion, but merely indicates to court that appointed counsel has given full consideration to relative merits of appeal and thus does not deny accused effective assistance of counsel (Stats § 809.32(1)).

ABRAHAMSON, J., HEFFERNAN, C.J. and BABLITCH, J., dissent.

PETITION for declaration of rights. *Rights declared.*

For the petitioner there were briefs and oral argument by *Louis B. Butler, Jr.,* assistant state public defender.

* See Callaghan's Wisconsin Digest, same topic and section number.

APPENDIX A

For the respondent the cause was argued by *James H. McDermott,* assistant attorney general, with whom on the brief was *Bronson C. La Follette,* attorney general.

LOUIS J. CECI, J. In this original action for a declaratory judgment, we are called upon to consider the constitutionality of sec. (Rule) 809.32(1), Stats. (1983–84),[1] which requires that appointed counsel, upon determining that a criminal appeal would be frivolous, submit a brief to the court of appeals which includes an explanation as to why any issues which might arguably support an appeal lack merit. Petitioner Louis B. Butler, the public defender in this case who was assigned to handle the appeal of defendant Ellis T. McCoy's criminal conviction, asserts that the defendant's constitutionally protected right to counsel, guaranteed by the sixth amendment to the United States Constitution and by art. I, sec. 7 of the Wisconsin Constitution, is violated by the so-called "no-merit brief" requirement. We disagree and now uphold the constitutionality of the rule contained in sec. 809.32(1).

The facts in this case are not in dispute. The defendant was convicted in Milwaukee county circuit

[1] Section 809.32(1) provides that, "If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service."

court on December 2, 1983, of one count of second-degree sexual assault, sec. 940.225(2)(a), Stats., and of one count of abduction, sec. 940.32(1).[2] In preparing for the appeal, petitioner concluded that further appellate proceedings were not warranted and that any issues which could be advanced in support of an appeal were without arguable merit under *Anders v. California,* 386 U.S. 738 (1967), and under sec. 809.32(1). Defendant was then advised of his available options, which included (1) voluntarily dismissing the appeal, (2) proceeding with the appeal *pro se,* or (3) submitting a no-merit brief, pursuant to sec. 809.32(1), to the appeals court. Defendant chose the no-merit brief option.

Prior to filing a no-merit brief, however, petitioner filed a motion in the appeals court, seeking to determine the constitutionality of sec. 809.32(1) and to clarify the scope of representation on appeal. The motion was denied on September 7, 1984, on standing grounds, with the appeals court stating that since the no-merit brief had not yet been filed, no justiciable controversy existed.

Petitioner filed a no-merit brief on October 22, 1984. The appeals court, on April 16, 1985, ordered that this brief be struck for noncompliance with sec. 809.32(1) and that a new brief be filed. Petitioner's brief complied with the requirements set forth in sec. 809.32(1), except that it did not contain a statement of reasons why the issues which might arguably support an appeal lacked merit.

Counsel petitioned this court on April 24, 1985, for a supervisory writ of prohibition and declaration of relator's rights, seeking to resolve the constitutional

[2]*State v. Ellis T. McCoy,* No. 84-929-CR-NM.

issue. On May 8, 1985, this court denied the petition, on the grounds that petitioner had an adequate remedy at law in the court of appeals. Petitioner renewed his motion in the court of appeals to determine the constitutionality of sec. 809.32(1), and the court again denied the motion, stating that any determination of the constitutionality of the no-merit rule should be made by this court. Thereafter, defense counsel renewed his petition to this court, which was granted on March 27, 1986.

Petitioner asserts that defendant's constitutionally guaranteed right to counsel, which includes the right to effective assistance of counsel, *State v. Ludwig,* 124 Wis. 2d 600, 606, 369 N.W.2d 722 (1985); *Strickland v. Washington,* 466 U.S. 668, 686 (1984), is violated by the no-merit requirement contained in sec. 809.32(1). Petitioner cites the decision of the United States Supreme Court in *Anders,* which is explicitly referred to in Wisconsin's no-merit rule, as the primary source of support for this conclusion. We agree that *Anders* should be the touchstone of our analysis, although we do not believe that it compels a finding of unconstitutionality. We therefore begin our discussion of an attorney's responsibilities to a criminal client upon appeal with an analysis of *Anders.*

In *Anders,* defense counsel, after consulting with his client and studying the trial record, determined that further appellate proceedings on behalf of his indigent client would be meritless. He so notified the appeals court by letter[3] and requested to withdraw as

[3]Counsel's letter stated, "'I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained

counsel for the defendant. The Court in *Anders* did not believe that counsel's letter, articulating only a "bare conclusion" regarding the merits of defendant's appeal, satisfied constitutional requirements. 386 U.S. at 742.

The procedure followed by defense counsel in *Anders,* the high Court held, was constitutionally defective because it "did not furnish petitioner with counsel acting in the role of advocate," *id.* at 743, and "[t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae.* The no-merit letter and the procedure it triggers do not reach that dignity." *Id.* at 744. The Court then explained what counsel's proper role on appeal should be:

> "[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires.

my views and opinions to him . . . [H]e wishes to file a brief in this matter on his own behalf.'" 386 U.S. at 742.

> On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Id.*
>
> "The utility of this procedure is that appointed counsel would not be force[d] . . . to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate. Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. This procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." *Id.* at 745.

The Wisconsin procedure goes beyond *Anders* and requires that the attorney file a brief which, in addition to articulating anything in the record which might support an appeal, includes a statement indicating why the appeal lacks merit. It is this latter requirement to which the petitioner objects and on which we now focus.

Petitioner contends that the discussion requirement is directly contrary to the court's admonition in

Anders that counsel on appeal is not to act as *amicus curiae,* but rather is obligated to act as advocate to the best of his or her ability. For support, petitioner additionally cites *Evitts v. Lucey,* 469 U.S. 387 (1985), which states that, citing *Anders,* appellate counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Id.* at 394. He asserts that when counsel is required to discuss the reasons why an appeal lacks merit, he or she is in effect abdicating the advocate's role and is instead arguing against the client. This, petitioner argues, is proscribed by *Anders.*

In addition, petitioner argues that a simple definitional approach compels a finding that if counsel is required to comply with the no-merit rule, he or she is no longer "advocating" appellant's cause.[4] When counsel files a no-merit brief which complies with the discussion requirement, petitioner argues, he or she is merely acting as *amicus curiae,* advancing a rationale which is more consistent with the views of the court than with the views and interests of defendant, counsel's client.[5]

[4]According to petitioner, an advocate "is one who supports, defends or pleads another's cause."

[5]Petitioner offers two definitions of *amicus curiae,* citing *Black's Law Dictionary* 75 (5th ed. 1979), which states that *amicus curiae* "means, literally, friend of the court. A person with strong interest in or views on the subject matter of an action may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views." Also cited is *Webster's New World Dictionary* 44 (2d ed. 1972), defining *amicus curiae* as "a person who offers, or is called in, to advise a court on some legal matter."

Petitioner then surveys cases from other jurisdictions which ostensibly support his position that appellate counsel must not deviate from the advocate's role and that the Wisconsin procedure is at odds with that principle. These cases, petitioner argues, demonstrate that counsel is not to play any part in determining the merits of the appeal. *See, e.g., State v. Allen,* 99 N.J. Super. 314, 322, 239 A.2d 675, 679 (1968), stating that "[o]nce a defendant exercises his right to appeal, his appellate counsel must be an advocate and he does not decide whether the claim will be successful as argued by the State. ... That task is for the courts."

We do not mean to disparage the importance of counsel's role as advocate. We are sensitive to the rights of a criminal defendant, especially an indigent defendant, to effective representation. We have previously recognized, in a case decided prior to the enactment of the no-merit rule, that the *Anders* analysis compels appointed counsel to "perform his duties as adequately as paid counsel so the indigent will not be deprived of adequate representation because of his indigency." *Cleghorn v. State,* 55 Wis. 2d 466, 471, 198 N.W.2d 577 (1972). We reaffirm our belief in that principle. However, we are nevertheless compelled to reject petitioner's proffered analysis.

We now uphold the constitutionality of the no-merit brief rule. While *Anders* does not sanction the use of the discussion requirement, it does not proscribe it, either. Our interpretation of *Anders* is consistent with cases which have validated the discussion requirement and which have construed that requirement to harmonize with, rather than diverge from, the *Anders* holding. *See, United States v. Edwards,* 777 F.2d 364 (7th Cir. 1985); *Nickols v. Gagnon,* 454 F.2d 467 (7th Cir. 1971). The court in *Edwards*

explicitly reaffirmed the attorney's obligation to file a brief which includes a statement indicating why arguments ostensibly supporting an appeal are without merit. 777 F.2d at 365–66. Similarly, in *Nickols,* the seventh circuit examined the adequacy of a letter, which included a discussion of "matter[s] demonstrating the absence of merit [of issues arguably supporting an appeal]," submitted by the defense attorney who was seeking to withdraw as counsel. 454 F.2d at 469. In deciding that the letter was adequate, the court contrasted counsel's letter which "included a reasoned exposition of the basis for his conclusion," *id.,* with the short letter submitted by counsel in *Anders,* which contained only a "conclusory statement" of the frivolity of the appeal. *Id.,* n. 4. Thus, the court in *Nickols* also contemplated, consistent with sec. 809.32(1), Stats., the discussion requirement and, further, did not believe that *Anders* in any way prohibited it. Likewise, we do not believe that *Anders* in any way prohibits it. Petitioner's reliance on *Evitts* is also misplaced, because it does not prohibit the discussion requirement, either.

Petitioner argues that when an attorney submits a statement which includes a discussion of why his or her client's appeal lacks merit, that attorney is, in effect, like the judge, "deciding" the merits of the appeal. This, petitioner argues, is impermissible because "[i]t is not counsel's prerogative to determine finally the merits of an appeal, but, as directed in *Anders,* 'the court—not counsel ... decide[s] whether the case is wholly frivolous.'" *Turner v. Haynes,* 162 W. Va. 33, —, 245 S.E.2d 629, 631 (1978). *See also, Rhodes v. Leverette,* 160 W. Va. 781, 239 S.E.2d 136 (1977); *People v. Feggans,* 67 Cal. 2d 444, 432 P.2d 21, 62 Cal. Rptr. 419 (1967); *State v. Varner,* 692 P.2d 753

(Utah 1984); *State v. Shattuck,* 140 Ariz. 582, 684 P.2d 154 (1984); *State v. Duncan,* 57 Ohio App. 2d 93, 385 N.E.2d 323 (1978).

We similarly believe that it is ultimately the court's, and not counsel's, prerogative to judge the relative merits of an appeal; nevertheless, we do not believe that the case authority cited by petitioner compels a finding that the discussion rule is unconstitutional. For example, counsel in *Turner* concluded that his client's appeal prospects would be without merit and so informed his client. Counsel, however, did not provide his client with a copy of the trial transcript, and an appeal was never pursued. In addressing defendant's claim that counsel's actions deprived him of his right to appeal, the court held that, applying *Anders,* counsel did not fulfill his obligation to his client. The court reasoned that counsel—not the court—ultimately decided that the appeal was without merit. 162 W. Va. at —, 245 S.E.2d at 631. It is evident that the court in *Turner* was never even given the opportunity to decide whether it agreed with counsel's conclusion of lack of merit. This was the constitutional infirmity.

For a similar holding, *see, Allen,* 99 N.J. Super. 314, 239 A.2d 675, where the court also found that defendant was deprived of his right to effective assistance of counsel. The defendant was not informed by his attorney that he had the right to appeal or that he had the right to counsel to prosecute an appeal. Again, the court there was never given the opportunity to decide whether counsel's conclusion that the appeal was meritless was adequately supported by case law, the record, or the applicable statutes.

To the contrary, when a court in Wisconsin is presented with counsel's conclusion that an appeal

would be meritless and in addition has before it a summary of the case or statutory authorities which might compel that conclusion, it, and not counsel, decides whether the discussion of why the appeal lacks merit should be accepted. If the Wisconsin rule merely permitted counsel to summarily conclude that the appeal was meritless, without including even a perfunctory discussion of the applicable facts or case authorities in support of that conclusion, *see, e.g., Feggans,* 67 Cal. 2d at 448, 432 P.2d at 23–24, 62 Cal. Rptr. at —, the same concerns raised in *Anders* regarding the constitutional insufficiency of a mere conclusory statement of no merit might arguably apply. That, however, is not the situation here.

We interpret the discussion rule to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with "notice" that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit. Thus, we do not believe the rule requires an attorney to argue against the client; rather, we believe the rule requires an attorney to fulfill a duty that co-exists with the duty owed to the client—that duty which is owed to the court. The court will be better equipped to make the correct decision about the potential merits of the appeal if it has before it not only the authorities which might favor an appeal, but also the authorities which

might militate against it. The court, as *Anders* mandates, is still the final arbiter, and it alone has the responsibility to determine whether the appeal is, in fact, frivolous. Our decision does not deviate from that principle.

We believe that the Wisconsin procedure serves several useful functions. In addition to providing the court with assistance in its review of the record, it assures the court that counsel has "discharged his obligation to his client in a competent and professional manner." *Nickols,* 454 F.2d at 470. That is, the Wisconsin procedure assures the reviewing court that an indigent defendant is receiving exactly that type and level of assistance that a paying client would be receiving under similar circumstances. When the court has before it a reasoned summary of the law militating against further apellate proceedings, it can be assured that the attorney has made an inquiry into the relative merits of the appeal and that the attorney's withdrawal request is valid and grounded in fact and in the law.

The Wisconsin procedure, once again, can be contrasted to that followed in *Anders,* where the attorney simply stated that an appeal would be frivolous and so informed the court in conclusory fashion. It was this conclusoriness that the court found constitutionally offensive in *Anders,* 386 U.S. at 742, because it was indicative of or at least implied a lack of diligence and preparation by the attorney such that it was evident that the criminal defendant was not obtaining the same type and quality of representation that he or she was likely to obtain from private counsel. Since the Wisconsin procedure avoids the type of conclusoriness that *Anders* found offensive, the same concerns raised in *Anders* regarding the quality

and equality of attorney representation are simply not as relevant here.

There is case support in other jurisdictions for the conclusion we have reached. *See, Caraway v. Texas,* 560 S.W.2d 690, 691 (Tex. Crim. 1978); *People v. Lowery,* 86 A.D.2d 537, 538, 445 N.Y.S.2d 992, 993 (1982), stating that "[a] mere mechanical statement that there are no valid issues that could legitimately be raised on an appeal is insufficient"; *Smith v. State,* 496 So. 2d 971, 974 (Fla. Dist. Ct. App. 1986); *Commonwealth v. McClendon,* 495 Pa. 467, 473, 434 A.2d 1185, 1188 (1981).

We reiterate that an indigent criminal defendant, while undisputedly entitled to receive the same level of representation that a paying defendant would receive, is not entitled to receive more than a paying client would receive. *See,* e.g., *Nickols,* 454 F.2d at 472–73. "When [the] attorney has reviewed the law and the record as an advocate and determines that there are no non-frivolous issues to be raised on appeal, the appellant has received what is constitutionally required." *State v. Horine,* 64 Or. App. 532, 548, 669 P.2d 797, 806 (1983).[6]

[6]Although involving a slightly different fact situation, *McClendon* is particularly instructive since it included a detailed statement regarding the "discussion of lack of merit" requirement. It stated that, "Once we are satisfied with the accuracy of counsel's assessment of the appeal as being wholly frivolous, counsel has fully discharged his responsibility. The role of an advocate, insisted upon in *Anders,* refers to the manner in which the record was examined in an effort to uncover grounds to support the appeal. Where counsel has in good faith satisfied that obligation and found the appeal to be wholly frivolous, he can do no more. We reject the view that his explanation of why there is no basis for an appeal should be interpreted as reflecting counsel's lack of concern in the client's cause. Nor can that fact be assigned as a reason for concluding that the client did not receive this constitutionally protected right of representation.' 495 Pa. at 473–74, 434 A.2d at 1188.

A final consideration which we believe is important to our decision is one which has been alluded to already, namely, the discussion requirement serves as a significant administrative aid to the reviewing court. It first provides a basis for the reviewing court to judge whether an appeal is meritorious. The brief in support of appeal, combined with the "no-merit" discussion, gives the court far more than just a "cold record" to look at; rather, the court has before it both the arguments in support of an appeal and a statement which at least refers to case authorities or factual references which do not support an appeal. Thus, the court has a substantial base of authority to refer to in making its own, independent evaluation of the case. This makes it less likely that the court will overlook important legal authorities which would either support or militate against continued appellate proceedings. Hence, the discussion requirement operates as a judicial aid, serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner. With an increase in the number of criminal appeals, this concern should be obvious.

Because we find that adherence to sec. 809.32(1), Stats., does not operate to deprive defendant of any of his constitutional rights, and given the other significant considerations we have enumerated, we affirm the constitutionality of the Wisconsin procedure. Therefore, the petition for a supervisory writ of prohibition is denied.

By the Court.—Rights declared.

SHIRLEY S. ABRAHAMSON, J. *(dissenting).* Our court rule requiring an appointed appellate defense lawyer in a criminal case to explain in a no-merit report the weaknesses in the client's appeal contravenes the *Anders* decision of the United States Supreme Court, complicates the already complex ethical dilemma faced by an appointed defense lawyer who decides that an appeal of the client's case would be frivolous, and is unnecessary to achieve the purposes which the majority believes justify the imposition of the requirement. Because I believe that our rule violates the defendant's sixth amendment right to effective assistance of counsel, and because I believe this court should respond by commissioning a study of a court rule when, as in this case, a challenge to a court rule reveals flaws in the rule, I dissent.

In *Anders v. California,* 386 U.S. 738 (1967), the United States Supreme Court undertook the difficult task of reconciling the professional and personal integrity of appointed appellate defense counsel with the constitutional right of criminal defendants to the assistance of counsel. ABA Standards Relating to the Defense Function, sec. 4–8.3, Commentary (2d ed. 1980). The Court achieved this reconciliation by providing that counsel convinced of the frivolousness of a client's appeal may request to withdraw from the case by following certain procedures, including filing a brief with the court that identifies "anything in the record that might arguably support the appeal." *Anders* appears to rest on the distinction between complete frivolity and absence of merit, the former justifying withdrawal, the latter not justifying withdrawal. *But see Cleghorn v. State,* 55 Wis. 2d 466, 475,

198 N.W.2d 577 (1972). *Anders* has been criticized as forcing appointed appellate defense attorneys to "brief the unbriefable," because a defense attorney who could find something in the record arguably supporting an appeal would not request to withdraw in the first place. ABA Standards Relating to the Defense Function, sec. 4–8.3, Commentary.

The *Anders* decision has drawn more than its share of criticism from courts, commentators and practitioners. Courts have interpreted *Anders* in a wide variety of ways and have adopted alternate mechanisms for dealing with the difficult dilemma at the heart of the case. *See, e.g., State v. Horine,* 64 Or. App. 532, 669 P.2d 797 (Ct. App. 1983); *State v. McKenney,* 98 Idaho 551, 568 P.2d 1213 (1977); *People v. Wende,* 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071 (1979). Commentators have found little that pleases them with the decision. *See, e.g.,* Hermann, *Frivolous Criminal Appeals,* 47 N.Y.U.L. Rev. 701 (1972); Pengilly, *Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal,* 9 Crim. Just. J. 45 (1986). Finally, practitioners find the *Anders* procedure either unworkable or distasteful or both.

Nevertheless, *Anders* is, as the majority points out, the "touchstone" of analysis in this case. *Anders* requires an appointed appellate defense attorney to act as an advocate even as he or she requests to withdraw from a case. The majority asserts that the discussion requirement in the court rule at issue in this case keeps appointed appellate defense counsel in the role of advocate because it insures "that the attorney has made an inquiry into the relative merits of the appeal and that the attorney's withdrawal request is valid and grounded in fact and in the law."

Majority opinion at page 10. It is not, however, the requirement that counsel search the record and research the law that the petitioner objects to in this case, but rather the requirement that counsel then place before the court any arguments that he or she has discovered which militate against the client's cause.

The United States Supreme Court specifically noted that it did not intend to "force appointed counsel to brief his case against his client." Defense counsel should be the client's advocate, not adversary. *Anders,* 386 U.S. at 745.

The majority explains that appointed appellate defense counsel's inclusion of arguments against the defendant is necessary to put the court on notice that the arguments in favor of the client are frivolous and to assist the court to make a correct decision about the potential merits of the appeal. Majority opinion at pages 9–10, 12. As the court recognized in *Anders,* 386 U.S. at 745, however, appointed appellate defense counsel provides sufficient assistance to the court simply by pointing out the possible arguments for the client. Appointed appellate criminal defense counsel's request to withdraw in itself puts the court on notice that counsel considers the arguments in the no-merit brief frivolous. Once raised, frivolous arguments by their very nature should not be difficult for a court to evaluate on its own without counsel supplying case authorities or factual references which militate against the appeal. Consequently, I conclude that there is no need to require defense counsel to assist the court by briefing the case against the client.

Counsel's filing a brief setting forth arguments against defendant's position is a task that benefits the court but not the client. Accordingly, such a task is

more properly assigned to an amicus curiae than to an advocate. The *Anders* court condemned procedures that place appointed appellate defense counsel in the role of amicus curiae rather than in the role of advocate for the defendant. 386 U.S. at 744. The Wisconsin requirement that appointed appellate defense counsel who files a no-merit brief must discuss therein the reasons why the appeal lacks merit violates the plain meaning and clear intent of *Anders* by transforming appointed appellate defense counsel from an advocate into an adversary or an amicus.

The disenchantment with our rule evidenced in this case and the widespread disenchantment with *Anders* indicate that the dilemma of appointed counsel who does not wish to prosecute a frivolous appeal deserves additional study to devise a solution that is more satisfactory to counsel yet is equally sensitive to the rights of indigent defendants, to the responsibilities of appointed counsel, and to the needs of the judicial system.

In its rulemaking capacity this court has the power to authorize a study of the rule and its effect on appointed appellate defense attorneys who feel that their clients' appeals are frivolous but who nevertheless cannot dissuade their clients from prosecuting the appeals. Such a study is the kind of response that this court should consider when presented with a challenge that raises significant doubts concerning the wisdom of the rule, even if the constitutional arguments against the rule do not persuade the court. Thus, I believe that even if the majority is convinced the rule is constitutional, it should initiate a reconsideration of the rule.

Accordingly, I dissent.

I am authorized to state that CHIEF JUSTICE NATHAN S. HEFFERNAN and JUSTICE WILLIAM A. BABLITCH join in this dissent.

Office of the Clerk

SUPREME COURT

STATE OF WISCONSIN

RECEIVED
MAR 26 1986
Office of State Public Defender
Post-Conviction Division
Milwaukee, WI

Madison, March 27, 1986

Mr. Ellis T. McCoy
P. O. Box 147
Fox Lake, WI 53933

Attorney Louis B. Butler, Jr.
Asst. State Public Defender
819 North 6th St., Rm. 821
Milwaukee, WI 53203

Attorney James H. McDermott
Asst. Attorney General

Attorney Eric Schulenburg
Chief, Appellate Division
Office of the State
Public Defender
P. O. Box 7862
Madison, WI 53707

Attorney E. Michael McCann
District Attorney
Milwaukee, WI 53233

Hon. William R. N
Presiding Judge
Hon. Ted E. Weden
Hon. Michael T. S
Court of Appeals,
District I
901 N. 9th Street
Milwaukee, WI 53

e Court today announced an order in your case as follows:

State ex rel. Ellis T. McCoy v.
Wisconsin Court of Appeals, District I Case No 86-0172-W

On January 24, 1986 a petition was filed seeking a supervisory writ to prohibit the Court of Appeals from striking the no merit brief previously filed in the appeal and ordering counsel for the defendant to provide reasons why the issues presented in that brief lacked merit. The petition also sought a declaratory judgment that sec. (Rule) 809.32(1), Stats., to the extent that it requires an attorney appointed to represent a criminal defendant in an appeal to discuss in a no merit brief why the issues that might arguably support the appeal lack merit, is unconstitutional. With respect to the latter, the petition constitutes a request for leave to commence an original action, pursuant to sec. (Rule) 809.70, Stats.

Pursuant to the court's February 21, 1986 order, a response to the petition was filed in which the respondent concurred in the request to commence an original action for declaratory judgment but objected to the granting of a supervisory writ of prohibition.

On March 13, 1986 the petitioner filed a motion requesting permission to file a brief or a reply to the respondent's brief submitted with the response. The respondent filed a response in opposition to the motion on March 19, 1986.

APPENDIX B

IT IS ORDERED that the petition, insofar as it seeks a declaratory judgment with respect to the constitutionality of sec. (Rule) 809.32(1), Stats., is granted.

IT IS FURTHER ORDERED that the petitioner shall file a brief on the merits within 40 days of the service of this order; within 30 days of the service of the petitioner's brief the respondent shall file a brief or a statement that no responsive brief will be filed; within 15 days of the service of the respondent's brief the petitioner shall file a reply brief or a statement that a reply brief will not be filed.

IT IS FURTHER ORDERED that the petition, insofar as it seeks a supervisory writ of prohibition, is held in abeyance pending further order of the court.

MARILYN L. GRAVES

B-2

Clerk of Supreme Court.

MENT OF HEALTH AND SOCIAL SERVICES
of Corrections
(Rev. 3/82)

STATE OF WI
Wiscon
Secti

JUDGMENT OF CONVICTION
SENTENCE TO WISCONSIN STATE PRISONS

STATE OF WISCONSIN, Plaintiff
v.
LIS T. McCOY Defendant

STATE OF WISCONSIN, Circuit Court Branch
County Milwaukee
1-10-53 Defendant Date of Birth
Court Case No. K-3561

The defendant entered his/her plea(s) of ☐guilty ☒not guilty ☐no contest;

3 The ☒Court ☐Jury found the defendant guilty of:

	Wis. Statute(s) Violated	Felony or Misdemeanor (F or M)	Com
Second degree sexual assault	940.225 (2)(e)	F	6-19-8
Abduction	940.32 (1)	F	6-19-82

d in this County, and

On December 2, 1983, the Court inquired of the defendant why sentence should not be pronounced, and no o the contrary being shown or appearing to the Court, the Court having accorded the district attorney, defense counsel, and the defendant address the Court regarding sentence; and upon all the evidence, records and proceedings, the Court pronounced Judgment as follows:

IT IS ADJUDGED that the defendant is convicted as found guilty, and is sentenced to the Wisconsin State Prisons for an indeterminat than SIX (6) YEARS - each count, consecutive

fendant to pay $30 victim/witness surcharge, as to EACH count.

IT IS ADJUDGED that 69 days sentence credit are due pursuant to Sec. 973.155, Wis. Stats.

IT IS ORDERED that the Clerk deliver a duplicate original of this Judgment to the Sheriff, and that the Sheriff shall forthwith deliver the . of this Judgment to the Dodge Correctional Institution (Reception Cente of Waupun, Wi.

(affix seal)

BY ORDER OF THE COURT: Signature of Judge, Deputy or Clerk of Court

Name of Judge	Date Signed
WILLIAM A. JENNARO	December 2, 19
Name of Defense Attorney	Name of District Attorney
Mark Nimmemann	E. Michael McCa

APPENDIX C

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 84-929-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ELLIS T. McCOY,

Defendant-Appellant.

MOTION TO DETERMINE CONSTITUTIONALITY OF RULE 809.32(1) AND TO CLARIFY SCOPE OF ATTORNEY'S REPRESENTATION ON APPEAL

Now comes the above-named defendant, Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, and hereby moves this court for an order determining the constitutionality of Rule 809.32(1) and to clarify the scope of the attorney's representation, pursuant to Rule 809.14, on the following grounds:

1. On January 24, 1984, the above-name attorney was appointed to represent the above-named defendant for purposes of appeal. The final transcript was filed April 5, 1984, and a notice of appeal was filed May 4, 1984.

2. After doing research in preparation for filing the brief in this action, which would be due on August 20, 1984 pursuant to Rule 809.30(2)(f) and an extension granted by this court on July 24, 1984, this attorney has concluded that further appellate proceedings on behalf of Mr. McCoy would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967) and Rule 809.32(1).

3. This attorney discussed the matter by telephone with Mr. McCoy on August 10 and 13, 1984. Mr. McCoy was advised that his options included voluntarily dismissing the appeal, proceeding with the appeal pro se or requiring this attorney to file a no merit report. Mr. McCoy has asked this attorney to file a no merit report.

4. The United States Supreme Court in Anders, supra, has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae, 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. Id. If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. Id. That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. Id. After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Id. If the appeal is frivolous, the court may grant the

request to withdraw and dismiss the appeal, and if not, the the defendant is entitled to appointed counsel for the appeal The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

386 U.S. at 745.

5. The Wisconsin Supreme Court, consistent with Anders has held that the Wisconsin no merit procedure which was i existence prior to the creation of Rule 809.32(1) did no require counsel to argue against his client but demanded fair evaluation of the record and a search for meritoriou grounds therein. Cleghorn v. State, 55 Wis. 2d 466, 472, 19 N.W.2d 577 (1972).

6. Rule 809.32(1) requires that if an attorney is o the opinion that further appellate proceedings on behalf o the defendant would be frivolous and without any arguabl merit within the meaning of Anders, the attorney shall fil with the court a brief in which is stated anything in th record that might arguably support the appeal and a discussio of why the issue lacks merit.

7. While it is clear pursuant to Anders that a no merit brief is required when an attorney reaches that determination and the defendant wishes to pursue his or her appeal, defendant submits that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on defendant's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by Anders,

but would be in the awkward position of arguing why hi client's appeal lacks merit. This would be contrary to th mandate of Anders that the attorney not brief the case agains the client and that the attorney act as an advocate. Since a attorney is legally bound to represent the best interests o his or her client until relieved from further representatio by this court, defendant submits that a discussion of why an issue lacks merit would violate the sixth amendment.

8. Defendant submits that a no merit report consisten with Anders and with the remainder of Rule 809.32(1) woul protect the interests of the client while informing the cour that further proceedings would be frivolous. The attorne would be able to present the court with any issue which migh arguably support the appeal, giving the court, not counsel, a opportunity to decide whether the appeal is frivolous. Such a procedure would not put the attorney in the position of arguing against his client.

9. This attorney, while believing the portion of Rule 809.32(1) which requires a discussion of why the issue lacks merit to be unconstitutional, will file whatever type of no merit report this court determines to be appropriate. This attorney suggests that the order determining the constitutionality of the challenged portion of the Rule be published. The no merit report will be due on October 2, 1984, based on the service of the transcripts, not including the time that is tolled due to the filing and determination of this motion.

WHEREFORE, this attorney respectfully requests that this court determine the constitutionality of that portion of 809.32(1) which requires a discussion of why any issue lacks merit, and clarify the scope of this attorney's representation on appeal.

Dated this 14 day of August, 1984.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant State Public Defender

Attorney for Defendant-Appellant.

P.O. Address:

230 West Wells Street, Room 500
Milwaukee, Wisconsin 53203
Telephone: (414) 224-4891

cc: Kirbie Knutson
Assistant Attorney General

Eric Schulenberg
Chief, Appellate Division

Ellis T. McCoy
Box 147
Fox Lake, WI 53933

DISTRICT I
Office of the Clerk
COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Madison, September 7, 1984

To:
E. Michael McCann
District Attorney
821 W. State Street
Milwaukee, WI 53233

Kirbie Knutson
Asst. Attorney General

Louis B. Butler, Jr.
Asst. State Public Defender
230 W. Wells St., Rm. 500
Milwaukee, WI 53203

You are hereby notified that the Court entered the following order:

84-929-CR State of Wisconsin v. Ellis T. McCoy

Before Wedemeyer, P.J., Moser and Sullivan, JJ.

The defendant, by his attorney, has moved the court for an order determining the constitutionality of Rule 809.32(1), Stats., and clarifying the scope of an attorney's representation in cases where the attorney concludes that further appellate proceedings on behalf of his client would be frivolous and without arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967). The defendant's counsel states that he believes that the portion of Rule 809.32(1) which requires a discussion of why the appeal lacks merit infringes on the defendant's sixth amendment right to counsel, but that he will file whatever type of no merit report this court determines to be appropriate.

The motion is denied. The general rule is that courts do not decide abstract principles of law, City of Racine v. J-T Enterprises of America, Inc., 64 Wis.2d 691, 700, 221 N.W.2d 869, 874 (1974), or render advisory opinions, Smith v. Pershing, 10 Wis.2d 352, 357, 102 N.W.2d 765, 768 (1960). Judicial restraint dictates not passing on an issue until the facts of the proper case present a justiciable controversy. State ex rel. Deisinger v. Treffert, 85 Wis.2d

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MILWAUKEE, WISCONSIN

APPENDIX E

257, 271, 270 N.W.2d 402, 409 (1978). A justiciable controversy constitutes a controversy in which a claim of right is asserted against one who has an interest in contesting it. Pension Management, Inc. v. DuRose, 58 Wis.2d 122, 128, 205 N.W.2d 553, 555 (1973). The justiciable controversy requirement compels the courts to refuse to determine hypothetical or future rights. See id. at 128, 205 N.W.2d at 555-56.

Based on these standards, we conclude that the relief requested in the motion should not be granted. The motion in effect requests this court to render an advisory opinion informing the defendant's counsel of whether this court would conclude that a no merit report filed in accordance with Rule 809.32(1) deprived the defendant of assistance of counsel as required by the sixth amendment to the U.S. Constitution. Since a no merit report has not yet been filed, the defendant has not and cannot yet claim that he was deprived of his right to assistance of counsel. Consequently, no justiciable controversy exists involving the constitutionality issue. The constitutionality issue therefore cannot properly be addressed by this court at this time.

Upon the foregoing reasons,

IT IS ORDERED that the motion to determine the constitutionality of Rule 809.32(1), Stats., and to clarify the scope of representation is denied.

Marilyn L. Graves
Clerk of Court of Appeals

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 84-929-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ELLIS T. McCOY,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION
AND SENTENCE ENTERED DECEMBER 2, 1983, IN CIRCUIT COURT,
MILWAUKEE COUNTY, HONORABLE WILLIAM A. JENNARO, PRESIDING
PURSUANT TO RULE 809.32(1).

BRIEF OF DEFENDANT-APPELLANT

LOUIS B. BUTLER, JR.
Assistant State Public Defender

230 West Wells Street, Room 500
Milwaukee, Wisconsin 53203

Attorney for Defendant-Appellant

APPENDIX F

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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 84-929-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ELLIS T. McCOY,

Defendant-Appellant.

ON APPEAL FROM THE JUDGMENT OF CONVICTION AND SENTENCE ENTERED DECEMBER 2, 1983, IN CIRCUIT COURT, MILWAUKEE COUNTY, HONORABLE WILLIAM A. JENNARO, PRESIDING PURSUANT TO RULE 809.32(1).

BRIEF OF DEFENDANT-APPELLANT

INTRODUCTION

This attorney has concluded that further apellate proceedings on behalf of Mr. McCoy would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967) and Rule 809.32(1). The following brief has been prepared in compliance with Anders. However, because this attorney believes that the portion of Rule 809.32(1) which requires a discussion of why an issue

lacks merit is directly contrary to Anders and unconstitutional, this attorney cannot ethically take a position which would argue against his client or act as amicus curiae. See S.C.R. 20.34(1)(c) and (2)(a) (1984).

The United States Supreme Court in Anders, supra, has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae, 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. Id. If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. Id. That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. Id. After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Id. If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

386 U.S. at 745.

The Wisconsin Supreme Court, consistent with Anders, has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. Cleghorn v. State, 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972).

Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders, the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

While it is clear pursuant to Anders that a no merit brief is required when an attorney reaches that determination and the defendant wishes to pursue his or her appeal, defendant and this attorney submit that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on defendant's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by Anders, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be contrary to the mandate of Anders that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further

representation by this court, defendant and this attorney submit that a discussion of why any issue lacks merit would violate the sixth amendment.

Defendant and this attorney submit that a no merit report consistent with Anders and with the remainder of Rule 809.32(1) would protect the interests of the client while informing the court that further proceedings would be frivolous. This attorney would be able to present the court with any issue which might arguably support the appeal, giving the court, not counsel, an opportunity to decide whether the appeal is frivolous. Such a procedure would not put the attorney in the position of arguing against his client. This attorney has therefore prepared this brief in compliance with Anders, and the brief will not include a discussion of why any issue lacks merit. This approach fulfills this attorney's ethical obligation to protect his client's sixth amendment right to counsel on appeal. S.C.R. 20.34(1)(c) and (2)(a) (1984).

ISSUES PRESENTED

1. Did the failure by the nurse at the House of Correction to give defendant the correct test to determine whether he had gonorrhea violate his rights to due process and a fair trial when the test was pursuant to a search warrant?

Trial court answered: No.

2. Did the ex parte hearing on the application for a search warrant and the execution of the search warrant at the

jail outside attorney's presence violate defendant's sixth amendment right to counsel?

Not answered by the trial court.

3. Was the evidence presented at trial sufficient to support a conviction for one count of second degree sexual assault and one count of abduction?

Trial court answered: Yes.

4. Was the sentence excessive?

Not answered by the trial court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This is an Anders brief, and as such, is not usually appropriate for publication. Nevertheless, because a portion of Wisconsin's No Merit Rule may be unconstitutional, a decision by this court would either modify the existing rule or clarify it. Accordingly, publication would be warranted.

Because of the complex nature of the question of an attorney's responsibility when the client wishes to pursue a no merit appeal, oral argument is requested as to how a no merit report should be prepared.

STATEMENT OF THE CASE

This matter is before the court on appeal, pursuant to Rule 809.32(1), from the judgment of conviction and sentence entered December 2, 1983, of the appellant, in circuit court, Milwaukee County, Honorable William A. Jennaro presiding. Appellant McCoy (hereinafter "defendant") was convicted of one

count of second degree sexual assault, contrary to sec. 940.225(2)(a), and one count of abduction, contrary to sec. 940.32(1), Stats.

Upon conviction, defendant was sentenced to six years, each count, to be served consecutively at the Dodge Correctional Institute at Waupun.

STATEMENT OF FACTS

Ellis T. McCoy was charged with one count of second degree sexual assault and one count of abduction, contrary to secs. 940.225(2)(e) and 940.32(1), Stats. (2: 1-2).

On July 8, 1982, the state applied for a search warrant to obtain blood, saliva, head and pubic hair and a test for the possibility of venereal disease from the defendant (23: 2). A Detective Doyle learned that the victim, C.D., contracted gonorrhea as a result of the attack (23: 5). The state asserted that there is a possible leaving behind of seminal fluid from the assailant to the victim, and that a blood type could be determined from the fluid (23: 6). For comparison purposes, the Wisconsin Regional Crime Laboratory would need a blood sample, pubic and head hair samples and saliva (23: 7). Because Mr. McCoy was in custody, the test could be taken in the nurse's office of the Milwaukee County Jail by the nurse (23: 7). The officer testified that the nurse had taken numerous samples from other persons in the past (23: 7), and had training and experience in taking those samples.(23: 8).

The court found probable cause for the issuance of the search warrant to obtain, under medical supervision by a doctor or nurse qualified to perform the functions, the various samples (23: 9-10). The warrant specifically authorized the taking of blood and saliva samples, head and pubic hair samples and appropriate testing for gonorrhea by the nurse "pursuant to approved medical procedures" (22: 1). The transcript reflects that no appearance was made by the defendant or his attorney at the hearing (23: 1), which occurred July 8, 1982, after the preliminary hearing of June 19, 1982 (10: 1, et seq).

After receiving a doctor's report from Atlanta, the state decided to proceed with the prosecution (12: 3-4). The assistant district attorney thought that the medical evidence or opinions would dispose of the case, but found that they did not because the wrong test was performed (12: 3-4).

At trial, Nurse Mary Schuknecht of the County Jail testified that she came in contact with Ellis McCoy on July 8, 1982 pursuant to a search warrant (14: 25). She collected blood, saliva, head and pubic hair samples and conducted a test normally done by the jail for gonorrhea (14: 26). That test involved taking a swab of the urethra, putting it on a lab slide and sending it to the Milwaukee Health Department (14: 26). There were no facilities in the County Jail to take gonorrhea samples to be used for a culture as opposed to the slide analysis on that date (14: 27). All that was needed was a culture medium container (14: 29).

The results from the test that was done was negative for gonorrhea (14: 29).

Robert Bagley, a bacteriologist for the City of Milwaukee Health Department, testified that a culture was the preferred procedure for gonorrhea testing because it was a specific test for gonorrhea (14: 31-32). The "gram stain" slide method at best was only presumptive evidence of gonorrhea (14: 31-32, 35-36).

The test performed on Mr. McCoy was largely inconclusive (14: 35-36). There were very few cells on the slide resembling gonorrhea (14: 38-40).

Dr. Michael Dailey testified that it was not always necessary to receive treatment in order to get rid of gonorrhea (14: 49). One can shed the organism by going to the bathroom (14: 49-50).

The victim, C.D., had gonorrhea (14: 50). The testing of Mr. McCoy does not establish either way whether he had gonorrhea or not (14: 54). That is because of the possibility of error due to the slide test (14: 57). A culture would have been the appropriate test (14: 58).

Mary Peth Varriale testified that the vaginal swab of C.D. was negative for the presence of semen or spermatozoa (15: 76). No seminal stains were found on a pair of her blue panties, and the only hair found on the panties belonged to C.D. (15: 77-78). However, another pair of panties had a stain containing intact spermatozoa (15: 79). Ms. Varriale attempted to individualize the stain as to the A, B, or O blood

group of the person who contributed the semen, but the results were inconclusive (15: 81). She did not find any of Mr. McCoy's hair or saliva on the victim's clothing (15: 85).

C.D. testified that at approximately 10:00 p.m. she received a phone call from the defendant (15: 92). He asked if her sister and mother were home, and when she said no, he asked if he could come by and help plan a birthday party for his girlfriend (15: 94). C.D. told him he could not come over (15: 95). She called her mother on the phone and told her she was scared, so her mother told her to lock the doors and go upstairs (15: 96).

Five minutes later, C.D. saw Mr. McCoy standing outside a window (15: 96-97). McCoy rang the doorbell, and C.D. told him to leave, but he would not leave (15: 99). McCoy told that he was planning a surprise party for his girlfriend and wanted a pencil and paper (15: 101). He also wanted a kiss (15: 102). She gave him the paper and locked the door (15: 103-104). Five minutes later, she looked to see if he had gone, opening the door (15: 104). McCoy grabbed her, took her to the car, drove to a dark place and assaulted her (15: 106-114). Her glasses were knocked off during the struggle (15: 106-107).

After the assault, McCoy went to a gas station to get gas (15: 211). There were other people at the station, but C.D. did not get out of the car or run away, nor did she tell anyone else she had been assaulted (16: 224). He told her not to tell anyone (16: 235). He also called later to ask her if she was alright and told her to take a shower (16: 249).

Detective Patrick Doyle, after arriving at the victim's home found a package of Salem cigarettes and a lense and the left bow for C.D.'s eyeglasses in the yard (17: 5).

Ellis McCoy admitted going to C.D.'s house and taking her to the gas station (17: 36-39). He denied sexually touching C.D. (17: 44-45). He also has a defect in his right arm which prevents him from lifting anything heavy (17: 65).

Leo Draveling, who used to live with the victim's mother, was of the opinion that C.D. was untruthful, and that her fourth grade teacher and superintendent of her school were of the same opinion (17: 87,90-93).

The trial court in evaluating the evidence[1/] recognized that the gonorrhea test done was unsatisfactory but found nevertheless that the defendant was guilty beyond a reasonable doubt (17: 133-137). Upon conviction, Mr. McCoy was sentenced to indeterminate terms of not more than six years, each count, consecutive to each other, for the abduction and sexual assault charges (18: 14).

Further facts will appear in the argument.

1/ The jury had been waived by the defendant against counsel's advice mid-trial (15: 64-67).

ARGUMENT

I. THE FAILURE TO CONDUCT THE APPROPRIATE TEST TO DETERMINE WHETHER DEFENDANT HAD GONORRHEA RESULTED IN THE DESTRUCTION OF EVIDENCE MATERIAL TO THE DEFENSE.

The Wisconsin Supreme Court has ruled that the destruction of evidence material to the defense violates due process. State v. Amundson, 69 Wis. 2d 554, 577-580, 230 N.W.2d 775, 788 (1975). In reaching its decision, the court adopted the reasoning set forth in United States v. Bryant, 142 U.S. App. D.C. 132, 439 F.2d 642 (D.C. Cir. 1971).

Other decisions which have adopted the Bryant reasoning have set forth a three-pronged test to determine whether the destruction of material evidence violates due process: (1) the state's bad faith or negligence; (2) the importance of the evidence; and (3) the other evidence of guilt adduced at trial. Johnston v. Pittman, 731 F.2d 1231, 1234 (5th Cir. 1984); and Armstrong v. Collier, 536 F.2d 72, 78 (5th Cir. 1976). Applying this test to the facts of this case, there can be no doubt that the failure to conduct the correct gonorrhea test was due to the state's negligence, as the trial court indicated that the test conducted was unsatisfactory (17: 133-137). There can also be no question that the correct test was material and important to the defense, as the victim had gonorrhea and the inconclusive test indicated that there was no presence of gonorrhea in the defendant (14: 29, 31-36, 38-40, 50). If the defendant did not have gonorrhea, then not only did he probably not commit the assault on the victim, but the victim would now have a motive for falsely accusing

defendant in order to explain how she contracted gonorrhea in the first place. State ex rel. Lyons v. DeValk, 47 Wis. 2d 200, 204-206, 177 N.W.2d 106 (1970). Thus, the only question to be determined is whether the other evidence at trial was so lacking that the defendant was deprived of due process.

Defendant submits that absent the correct test for gonorrhea, the remaining evidence at trial is so lacking in probative value that a sufficient question has been raised as to whether he had gonorrhea. Defendant submits that if he did not have the disease, then he could not have committed the offense. Therefore, a new trial should be ordered as to both counts.

II. THE TAKING OF BLOOD, HAIR, SALIVA AND GONORRHEA TEST SAMPLES OUTSIDE THE DEFENSE ATTORNEY'S PRESENCE, FOLLOWING AN EX PARTE PROCEEDING WHEN THE SEARCH WARRANT WAS APPLIED FOR, VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

The complaint in this action was filed June 21, 1982. the information in this action was filed June 29, 1982 (3: 1). Thus, the defendant's sixth amendment right to counsel attached, as formal charging had already taken place. Brewer v. Williams, 430 U.S. 387, 398 (1977).

The search warrant proceeding took place July 8, 1972 (23: 1, et seq.). The record reflects that no appearance was made by defendant or counsel at the hearing (23: 1). Moreover, there is nothing in the record to indicate that defense counsel was present when the warrant was executed at the jail.

Sec. 971.04 provides the defendant has a right to be present at any evidentiary hearing. Evidence was taken during the search warrant proceeding, yet neither defendant nor counsel were present. Thus, defendant submits that his sixth amendment right to counsel and his statutory right to be present were violated when the proceedings were conducted ex parte.

Defendant recognizes that normally, pre-search proceedings are ex parte and conducted in secrecy, as the subject of the search should not be tipped off to the application lest he destroy or remove evidence. Sec. 968.21. See Franks v. Delaware, 438 U.S. 154, 169 (1978). However, defendant's case falls within a different category than the normal search, as formal proceedings have already been initiated against him. Second, there is no chance that the evidence can be removed or destroyed, as defendant is in custody. Finally, an adversary hearing should be required before the warrant is issued because of the nature of the search and the type of intrusion the defendant is facing. Schmerber v. California, 384 U.S. 757, 768 (1966); United States v. Crowder, 543 F.2d 312, 316 (1975), cert. denied, 429 U.S. 1062 (1977).

Had defense counsel been present at the search warrant proceeding, he might have pointed out to the court exactly what the appropriate test would be for gonorrhea, so that the court would have been in a position of specifying what test should be done. Alternatively, had counsel been present at

the jail when the warrant was executed, then he could have objected to the procedure that was actually done, been in a position to know that the test was the wrong one, and either challenge the execution of the warrant or conduct independent tests.

Defendant is mindful of the fact that no objection was made either to the ex parte proceeding or to the absence of counsel's presence at the jail, but submits that because the error affects the integrity of the factfinding process, this court must review it as plain error. Sec. 901.03(4), Stats. See also State v. Gustafson, 119 Wis. 2d 676, 693, ___ N.W.2d ___ (1984); and State v. Baldwin, 101 Wis. 2d 441, 446, 304 N.W.2d 742 (1981). Thus, defendant submits that a new trial be ordered in this action as to each count.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION.

C.D. had gonorrhea. The test given to defendant, while inconclusive, was negative for gonorrhea. Thus, if defendant did not have the disease, as the test results indicate, then C.D. had a motive for falsifying her testimony.

The only corroboration for the assault, the broken glasses and the cigarette package, could have easily been manufactured by C.D. in an attempt to explain her disease. The semen found on her underpants cannot be tied to him, and there was no way to tell the age of the stain. Thus, that evidence is not corroborative of the assault and abduction. Given Leo Draveling's opinion that he, C.D.'s fourth grade

teacher and the superintendent of her school thought she was untruthful (17: 87, 90-93), defendant submits that this case falls within the rule of Syvock v. State, 61 Wis. 2d 411, 414-416, 213 N.W.2d 11 (1973). Accordingly, defendant submits that the evidence is insufficient to support a conviction in this action.

IV. THE SENTENCE IN THIS ACTION IS EXCESSIVE.

Defendant recognizes that ordinarily appellate courts will not interfere with the sentencing discretion of the trial court. Ocanas v. State, 70 Wis. 2d 179, 233 N.W.2d 457 (1975). Nevertheless, defendant submits that even if this court affirms the convictions in this case, the abduction and the sexual assault arose out of the same set of facts and same incident, so that concurrent sentences are warranted. Thus, this court should modify the two six year sentences to concurrent terms.

CONCLUSION

In light of the foregoing, defendant respectfully requests that this court reverse the judgment of the trial court and order a new trial as to each count. Alternatively, defendant requests that his sentences be modified to concurrent terms.

In addition, defendant respectfully requests that this court determine the constitutionality of Rule 809.32(1) and the scope of his attorney's representation under that rule.

Finally, this attorney respectfully requests permission to withdraw as counsel.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant State Public Defender

230 West Wells Street, Room 500
Milwaukee, Wisconsin 53203

Attorney for Defendant-Appellant

cc: Kirbie Knutson
Assistant Attorney General

Eric Schulenberg
Chief, Appellate Division

Ellis T. McCoy

DISTRICT I

Office of the Clerk

COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Madison, April 16, 1985

To:

E. Michael McCann
District Attorney
821 W. State Street
Milwaukee, WI 53233

Ellis T. McCoy
P. O. Box 147
Fox Lake, WI 53933

Kirbie Knutson
Asst. Attorney General

Louis B. Butler, Jr.
Asst. State Public Defender
819 N. Sixth St., 8th Fl.
Milwaukee, WI 53203

You are hereby notified that the Court entered the following order:

84-929-CR-NM State of Wisconsin v. Ellis T. McCoy

Before Wedemeyer, P.J., Moser and Sullivan, JJ.

Ellis McCoy was found guilty of one count of second-degree sexual assault and one count of abduction. Assistant State Public Defender Louis Butler was appointed to represent McCoy on appeal. Butler filed a notice of appeal on McCoy's behalf but subsequently concluded that there was no merit to the appeal.

Rule 809.32(1), Stats., provides that:

> If an attorney appointed under s. 967.06(3) or Rule 809.30 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S.738 (1967), the attorney shall file with the court of appeals three copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service.

Butler has now filed his brief in this matter. The brief suggests four issues which might arguably support the appeal but does not indicate why those issues lack merit. Accordingly, the brief is not in compliance with Rule 809.32(1), Stats.

Upon the foregoing reasons,

IT IS ORDERED that the brief previously filed in this matter is struck. Assistant State Public Defender Louis Butler is directed to file a brief in compliance with Rule 809.31(1), Stats., within fifteen days of the date of this order.

Marilyn L. Graves
Clerk of Court of Appeals

RECEIVED
APR 18 1985
Office of State Public Defender
Post-Conviction Division
Milwaukee, WI

APPENDIX G

STATE OF WISCONSIN

IN SUPREME COURT

Case No. _____

STATE OF WISCONSIN EX REL.
ELLIS T. McCOY,

Relator,

v.

From: Appeal No. 84-929-CR-NM
Trial No. K-3561

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Respondent.

PETITION FOR SUPERVISORY WRIT OF PROHIBITION
AND DECLARATION OF RELATOR'S RIGHTS

The petition of Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, pursuant to Rule 809.71, Stats., hereby petitions this court for a supervisory writ of prohibition prohibiting the court of appeals from striking the brief previously filed and prohibiting the court of appeals from ordering counsel to provide reasons why the issues presented in that brief lack merit, and petitions this court, pursuant to Rule 809.70, Stats., to determine the constitutionality of Rule 809.32(1) and whether the rule violates relator's sixth amendment right to counsel, on the following grounds:

1. The petitioner, Louis B. Butler, Jr., represents the relator, in the case of State of Wisconsin v. Ellis T. McCoy, Case No. 84-929-CR-NM, now pending in the court of appeals, District I.

2. Relator moved for a determination of the constitutionality of Rule 809.32(1) before the court of appeals in a motion dated August 14, 1984.

3. The court of appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." See September 7, 1984 order, p. 2 (attached).

4. A "No Merit" brief was filed by this attorney on October 22, 1984, which was in compliance with Anders v. California, 386 U.S. 738 (1967) and the subsequent decision of Evitts v. Lucey, 469 U.S. ___, 83 L.Ed.2d 821, 828 (1985), but not in compliance with Rule 809.32(1).

5. The court of appeals, District I, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included.

APPENDIX H

The court also ordered that petitioner file a new brief within 15 days of the date of that order which is in compliance with the Rule.

6. The United States Supreme Court in Anders, supra, has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae, 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. Id. If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. Id. That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. Id. After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Id. If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

7. The Wisconsin Supreme Court, consistent with Anders, has held that the Wisconsin no merit procedure which was in

existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. Cleghorn v. State, 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). This Court has not as yet had an opportunity to review the current procedure since the creation of Rule 809.32(1).

8. The United States Supreme Court very recently has reaffirmed its prior holding in Anders, stating that the attorney ". . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." Evitts v. Lucey, 83 L.Ed.2d at 828.

9. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders, the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the [illegible]ks merit.

10. Pet[illegible] and relator submit that the portion of sec. 809.32(1) [illegible] requires a discussion of why the appeal lacks merit would infringe on relator's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward position of arguing why his client's appeal lacks

merit. This would be directly contrary to the mandates of Anders and Lucey that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, petitioner and relator submit that a discussion of why any issue lacks merit violates the sixth amendment.

11. Because petitioner believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is unconstitutional, petitioner cannot ethically take a position which would argue against his client or act as a friend of the court. This Court's rules require that while serving as an advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. SCR 20.34(1)(c) (1984). This Court has also determined that an advocate may urge any permissible construction of the law favorable to his or her client, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification or reversal of the law. SCR 20.34(2)(c) (1984).

12. An order by this Court prohibiting the court of appeals from striking the brief previously filed and from ordering counsel to provide reasons why the issues lack merit is necessary in order to protect relator's sixth amendment right to counsel. It would resolve the conflict that exists

with the Wisconsin Rule and United State Supreme Court decisions.

13. An order by this Court as stated in para. 12 is necessary to prevent petitioner from violating this Court's ethical rules.

14. Petitioner would note that the No Merit procedure for petitions for review is substantially different than that for appeals, and that this Court does not require an attorney to provide reasons why a petition for review lacks merit. Compare 809.32(1) and (4).

15. Petitioner submits that the brief already filed in this action meets all of the requirements set forth by Anders and Lucey.

16. A declaration of relator's sixth amendment right to counsel and whether Rule 809.32(1) violated that right is necessary before any new brief is written to prevent petitioner from violating relator's sixth amendment right to counsel.

17. Petitioner and relator currently have no other adequate remedy at law, other than this petition, to protect relator's rights and prevent petitioner from violating his ethical duty.

WHEREFORE, petitioner respectfully requests that this Court strike that portion of rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, prohibit the court of appeals from striking

the brief already filed, and prohibit the court of appeals from requiring petitioner to provide reasons why relator's appeal lacks merit.

Dated this 23rd day of April, 1985.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant State Public Defender

819 North Sixth St., Room 821
Milwaukee, Wisconsin 53203

ERIC SCHULENBERG
Chief, Appellate Division

340 W. Washington Ave.
P.O. Box 7862
Madison, Wisconsin 53707

cc: Ellis T. McCoy
Box 147
Fox Lake, WI 53933

Ms. Kirbie Knutson
Assistant Attorney General

Hon. Ted E. Wedemeyer
Court of Appeals, District I

Hon. William R. Moser
Court of Appeals, District I

Hon. Michael T. Sullivan
Court of Appeals, District I

Office of the Clerk
SUPREME COURT
STATE OF WISCONSIN

RECEIVED
MAY - 9 1985
Office of State Public Defender
Post-Conviction Unit, Division
Milwaukee, WI

Louis B. Butler, Jr.
Assistant State Public Defender
819 North Sixth Street, 8th Floor
Milwaukee, WI 53203

Madison, May 8, 1985

Ellis T. McCoy
P. O. Box 147
Fox Lake, WI 53933

J. Denis Moran
Director of State Courts

Hon. Ted E. Wedemeyer, Jr.
Hon. William R. Moser
Hon. Michael T. Sullivan
Court of Appeals, District I
Suite 609, Courthouse
901 North 9th Street
Milwaukee, WI 53233

James H. McDer
Assistant Atto
General
P. O. Box 7857
Madison, WI 53

e Court today announced an order in your case as follows:

State ex rel. McCoy v. Court of Appeals, District I — Case No. 85-0781-W

On April 24, 1985 Assistant State Public Defender Louis B. Butler, Jr., filed a petition for a supervisory writ to prohibit the Court of Appeals, District I, from striking the brief he filed in an appeal pending in that court and prohibiting it from ordering him to provide reasons why the issues presented in that brief lack merit. The petition also asks this court, pursuant to sec. (Rule) 809.70, Stats., to determine the constitutionality of sec. (Rule) 809.32(1), Stats.

In the pending appeal, the petitioner moved the Court of Appeals for a determination of the constitutionality of sec. (Rule) 809.32(1), Stats., and the Court of Appeals denied that motion by order of September 7, 1984, on the ground that, because a no merit report had not been filed, "no justiciable controversy exists involving the constitutionality issue. The constitutionality issue therefore cannot properly be addressed by this court at this time." From this it appears that the petitioner is not entitled to a supervisory writ and declaratory relief from this court for the reason that he has an adequate remedy in the Court of Appeals by renewing his motion for a determination of the constitutionality of sec. (Rule) 809.32(1), Stats.

APPENDIX I

IT IS ORDERED, pursuant to sec. (Rule) 809.71, Stats., that the petition for supervisory writ and declaratory relief is denied.

Shirley S. Abrahamson, J., dissents.

MARILYN L. GRAVES

Clerk of Supreme Court.

I-2

STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 84-929-CR-NM

ELLIS T. McCOY,

Defendant-Appellant.

MOTION TO DETERMINE CONSTITUTIONALITY OF RULE 809.32(1) AND TO CLARIFY SCOPE OF ATTORNEY'S REPRESENTATION ON APPEAL

NOW COMES the above-named defendant, Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, and hereby moves this court for an order determining the constitutionality of Rule 809.32(1) and to clarify the scope of this attorney's representation, pursuant to Rule 809.14 and the order of the Wisconsin Supreme Court in State ex rel. McCoy v. Court of Appeals, District I, No. 85-0781-W, on the following grounds:

1. Defendant moved for a determination of the constitutionality of Rule 809.32(1) before the court of appeals in a motion dated August 14, 1984.

APPENDIX J

2. The Court of Appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." See September 7, 1984 order, p. 2 (attached).

3. A "No Merit" brief was filed by this attorney on October 22, 1984, which was in compliance with Anders v. California, 386 U.S. 738 (1967) and the subsequent decision of Evitts v. Lucey, 469 U.S. ___, 83 L.Ed.2d 821, 828 (1985), but not in compliance with Rule 809.32(1).

4. The Court of Appeals, District I, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included. The court also ordered that defendant file a new brief within 15 days of the date of that order which is in compliance with the Rule (attached).

5. Defendant filed a petition for supervisory writ of prohibition and declaration of relator's rights in the Wisconsin Supreme Court in State ex rel. McCoy v. Wisconsin Court of Appeals, District I, No. 85-0781-W, dated April 23, 1985.

6. The Wisconsin Supreme Court denied that petition on May 8, 1985, ruling that petitioner had an adequate remedy at

J - 2

law by renewing the motion for a determination of the constitutionality of the Rule in the Court of Appeals (attached).

7. The United States Supreme Court in Anders, supra, has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae, 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. Id. If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. Id. That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. Id. After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Id. If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

8. The Wisconsin Supreme Court, consistent with Anders, has held that the Wisconsin no merit procedure which was in

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existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. Cleghorn v. State, 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). The appellate courts of this state have not as yet had an opportunity to review the current procedure since the creation of Rule 809.32(1).

9. The United States Supreme Court very recently has reaffirmed its prior holding in Anders, stating that the attorney ". . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." Evitts v. Lucey, 83 L.Ed.2d at 828.

10. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders, the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

11. Defendant submits that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on his sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward

J-4

position of arguing why his client's appeal lacks merit. This would be directly contrary to the mandates of Anders and Lucey that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, defendant submits that a discussion of why any issue lacks merit violates the sixth amendment.

12. Because counsel believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is unconstitutional, counsel cannot ethically take a position which would argue against his client or act as a friend of the court. The Wisconsin Supreme Court's rules require that while serving as an advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. SCR 20.34(1)(c) (1984). The Court has also determined that an advocate may urge any permissible construction of the law favorable to his or her client, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification or reversal of the law. SCR 20.34(2)(c) (1984).

13. An order by this Court determining the constitutionality of the no merit rule is necessary in order to protect defendant's sixth amendment right to counsel. It would resolve the conflict that exists with the Wisconsin Rule and United State Supreme Court decisions.

J-5

14. An order by this Court as stated in para. 13 is necessary to prevent petitioner from violating the Supreme Court's ethical rules.

15. Petitioner would note that the no merit procedure for petitions for review is substantially different than that for appeals, and that the Supreme Court does not require an attorney to provide reasons why a petition for review lacks merit. Compare 809.32(1) and (4).

16. Petitioner submits that the brief already filed in this action meets all of the requirements set forth by Anders and Lucey.

17. A determination of the no merit rule, defendant's right to counsel and whether Rule 809.32(1) violates that right is necessary before any new brief is written to prevent petitioner from violating defendant's sixth amendment right to counsel.

WHEREFORE, petitioner respectfully requests that this Court strike that portion of Rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, and accept the brief that has already been filed in this action.

Dated this 4th day of June, 1985.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant State Public Defender

819 North Sixth Street, Room 821
Milwaukee, Wisconsin 53203

D-6

ERIC SCHULENBERG
Chief, Appellate Division

340 West Washington Avenue
P. O. Box 7862
Madison, Wisconsin 53707-7862

Attorneys for Defendant-Appellant.

cc: Mr. Ellis T. McCoy
Box 147
Fox Lake, WI 53933

Ms. Kirbie J. Knutson
Assistant Attorney General

D-7

DISTRICT I

Office of the Clerk

COURT OF APPEALS
OF WISCONSIN

Marilyn L. Graves
Clerk

Amended January 16, 1986
Madison, January 15, 1986

To: E. Michael McCann
James H. McDermott
Louis B. Butler, Jr.
Ellis T. McCoy
Hon. William A. Jennaro

Clerk of Circuit Court
(L.C. #K-3561)
(Milwaukee County)

RECEIVED
JAN 17 1986
Office of State Public Defender
Post-Conviction Division
Milwaukee, WI

You are hereby notified that the Court entered the following opinion and order:

84-929-CR-NM State of Wisconsin v. Ellis T. McCoy

Before Moser, P.J., Wedemeyer and Sullivan, JJ.

Ellis T. McCoy (McCoy) has renewed his motion for an order determining the constitutionality of Rule 809.32(1), Stats., and to clarify the scope of his counsel's representation pursuant to Rule 809.14, Stats., and order of the Wisconsin Supreme Court in State ex rel. McCoy v. Court of Appeals, District I, No. 85-0781-W. The procedural facts of the case follow.

On August 14, 1984, McCoy moved for determination of the constitutionality of Rule 809.32(1), Stats., before this court. The court denied the motion on September 7, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no

APPENDIX K

justifiable controversy exists involving the constitutionality issue." Subsequently, McCoy filed a no merit brief which was not in compliance with Rule 809.32(1), Stats. The court, in an order dated April 16, 1985, ordered that the no merit brief previously filed be struck for noncompliance with Rule 809.32(1), Stats. The court of appeals ordered McCoy to file a new brief in compliance with Rule 809.32(1), Stats., within fifteen days of the date of the order.

The defendant then filed a petition for a supervisory writ of prohibition and declaration of his rights in the Wisconsin Supreme Court in Wisconsin ex rel. McCoy v. Wisconsin Court of Appeals, District I, No. 85-0781-W. The supreme court denied the petition on May 8, 1985. It ruled that McCoy had an adequate remedy at law by renewing his motion for determination of the constitutionality of Rule 809.32(1), Stats., in the court of appeals. In accordance with that direction from the supreme court, McCoy has filed the present motion again requesting our determination of the constitutionality of Rule 809.32(1), Stats.

The court of appeals has no power to pass upon the questions posed by McCoy. Rule 809.32(1), Stats., is a rule prescribed by the supreme court for the regulation of the practice of the court of appeals. Such a procedural rule is binding upon this court until altered by the supreme court

K-2

or the legislature. Mosing v. Hagen, 33 Wis. 2d 636, 646-47, 148 N.W.2d 93, 99 (1967). Viewing McCoy's motion in this light, we conclude that any determination by this court of the constitutionality of Rule 809.32(1), Stats., would be advisory in nature. Courts of law do not render advisory opinions. Smith v. Pershing, 10 Wis. 2d 352, 357, 102 N.W.2d 765, 768 (1960). The constitutionality of sec. 809.32(1), Stats., must be determined by its supreme court authors and not by a court bound to obey what that court creates.

Upon the foregoing reasons,

IT IS ORDERED that McCoy's motion requesting that we determine the constitutionality of Rule 809.32(1), Stats., and to clarify the scope of representation is denied. Louis Butler, assistant public defender, is further directed to file a brief in compliance with Rule 809.32(1) within fifteen days of the date of this order.

Marilyn L. Graves
Clerk of Court of Appeals

K-3

STATE OF WISCONSIN

IN SUPREME COURT

Case No. _____

STATE OF WISCONSIN EX REL.
ELLIS T. McCOY,

Relator,

v.

From: Appeal No. 84-929-CR-NM
Trial No. K-3561

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Respondent.

PETITION FOR SUPERVISORY WRIT OF PROHIBITION AND DECLARATION OF RELATOR'S RIGHTS

The petition on behalf of Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, pursuant to Rule 809.71, Stats., hereby petitions this court for a supervisory writ of prohibition prohibiting the court of appeals from striking the brief previously filed and prohibiting the court of appeals from ordering counsel to provide reasons why the issues presented in that brief lack merit, in compliance with Rule 809.32(1), and petitions this

APPENDIX L

court, pursuant to Rule 809.70, Stats., to determine the constitutionality of Rule 809.32(1) and whether the rule violates relator's sixth amendment right to counsel, on the following grounds:

1. The petitioner, Louis B. Butler, Jr., represents the relator, in the case of State of Wisconsin v. Ellis T. McCoy, Case No. 84-929-CR-NM, now pending in the court of appeals, District I.

2. Relator moved for a determination of the constitutionality of Rule 809.32(1) before the court of appeals in a motion dated August 14, 1984.

3. The court of appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." See September 7, 1984 order, p. 2 (attached).

4. A "No Merit" brief was filed by this attorney on October 22, 1984, which was in compliance with Anders v. California, 386 U.S. 738 (1967) and the subsequent decision of Evitts v. Lucey, 469 U.S. ___, 83 L.Ed.2d 821, 828 (1985), but not in compliance with Rule 809.32(1).

5. The court of appeals, District I, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included.

The court also ordered that petitioner file a new brief within 15 days of the date of that order which is in compliance with the Rule.

6. The Wisconsin Supreme Court, in an order dated May 8, 1985 ruled that petitioner was not entitled to a supervisory writ and declaratory relief from that court for the reason "that he has an adequate remedy in the Court of Appeals by renewing his motion for a determination of the constitutionality of sec. (Rule) 809.32(1), Stats." See order in No. 85-0781-W, attached.

7. Petitioner renewed his "Motion to Determine Constitutionality of Rule 809.32(1) and to clarify Scope of Attorney's Representation on Appeal" in the Court of Appeals in a motion dated June 4, 1985 (attached).

8. The Court of Appeals denied petioner's motion in an order dated January 15, 1986 and amended January 16, 1986, stating that the "constitutionality of sec. 809.32(1), Stats., must be determined by its Supreme Court authors and not by a court bound to obey what that court creates." See order, attached.

9. The United States Supreme Court in Anders, supra, has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae, 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his

ability. Id. If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. Id. That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. Id. After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." Id. If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

10. The Wisconsin Supreme Court, consistent with Anders, has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. Cleghorn v. State, 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). This Court has not as yet had an opportunity to review the current procedure since the creation of Rule 809.32(1).

11. The United States Supreme Court very recently has reaffirmed its prior holding in Anders, stating that the attorney ". . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached

evaluation of the appellant's claim." Evitts v. Lucey. 83 L. Ed. 2d at 828.

12. The United States Court of Appeals recently held that "(i)f the Anders procedure is to work, therefore, the lawyer filing the Anders brief must, to the extent possible, remain in his role as advocate; at this stage of proceeding it is not for the lawyer to act as an unbiased judge of the merit of particular grounds for appeal. He or she is required to set out any irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious. This is done in order that those potential claims not be overlooked. The objective of these potential claims is for the court's determination, not the advocates." United States v. Blackwell, 767 F.2d 1486, 1487-88 (11th Cir. 1985).

13. At least one State Supreme Court has determined that it will no longer accept Anders motions, implying that frivolous briefs would be preferable. Huguley v. State, 253 Ga. 709, 324 S.E. 2d 729 (1985). But see Rule 809.25(3).

14. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders, the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

15. Petitioner and relator submit that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on relator's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be directly contrary to the mandates of Anders and Lucey that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, petitioner and relator submit that a discussion of why any issue lacks merit violates the sixth amendment.

16. Because petitioner believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is unconstitutional, petitioner cannot ethically take a position which would argue against his client or act as a friend of the court. This Court's rules require that while serving as an advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. SCR 20.34(1)(c) (1984). This Court has also determined that an advocate may urge any permissible construction of the law favorable to his or her client, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification or reversal of the law. SCR 20.34(2)(c) (1984).

17. An order by this Court prohibiting the court of appeals from striking the brief previously filed and from ordering counsel to provide reasons why the issues lack merit is necessary in order to protect relator's sixth amendment right to counsel. It would resolve the conflict that exists between the Wisconsin Rule and United State Supreme Court decisions.

18. An order by this Court as stated in para. 17 is necessary to prevent petitioner from violating this Court's ethical rules.

19. Petitioner would note that the No Merit procedure for petitions for review is substantially different than that for appeals, and that this Court does not require an attorney to provide reasons why a petition for review lacks merit. Compare 809.32(1) and (4).

20. Petitioner submits that the brief already filed in this action meets all of the requirements set forth by Anders and Lucey.

21. A declaration of relator's sixth amendment right to counsel and whether Rule 809.32(1) violated that right is necessary before any new brief is written to prevent petitioner from violating relator's sixth amendment right to counsel.

22. Petitioner and relator currently have no other adequate remedy at law, other than this petition, to protect relator's rights and prevent petitioner from violating his ethical duty.

WHEREFORE, petitioner respectfully requests that this Court strike that portion of rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, prohibit the court of appeals from striking the brief already filed, and prohibit the court of appeals from requiring petitioner to provide reasons why relator's appeal lacks merit in compliance with Rule 809.32(1).

Dated this 21st day of January, 1986.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant State Public Defender

819 North Sixth St., Room 821
Milwaukee, Wisconsin 53203

ERIC SCHULENBERG
Chief, Appellate Division

P.O. Box 7923
Madison, Wisconsin 53707

cc: Ellis T. McCoy
Box 147
Fox Lake, WI 53933

James McDermott
Assistant Attorney General

Hon. Ted E. Wedemeyer
Court of Appeals, District I

Hon. William R. Moser
Court of Appeals, District I

Hon. Michael T. Sullivan
Court of Appeals, District I

Supreme Court, U.S.
FILED
JUL 15 1987
JOSEPH F. SPANIOL, JR.
CLERK

(3)

Case No. 87-5002

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1986

STATE OF WISCONSIN, ex rel.
ELLIS T. McCOY,

Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Appellee.

ON APPEAL FROM
THE SUPREME COURT OF WISCONSIN

MOTION TO DISMISS APPEAL
Or, in the Alternative
TO AFFIRM JUDGMENT

DONALD J. HANAWAY
Attorney General
State of Wisconsin

JAMES H. MCDERMOTT
Assistant Attorney General

DAVID C. RICE
(Counsel of Record)
Assistant Attorney General

Attorneys for Appellee

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-6823

4 pp

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STATE OF WISCONSIN, ex rel.
ELLIS T. McCOY,

Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Appellee.

MOTION TO DISMISS APPEAL
Or, in the Alternative
TO AFFIRM JUDGMENT

Pursuant to Rule 16, paragraphs 1(a) and (c) of the Rules of this Court, the appellee moves that this appeal be dismissed, on the ground of lack of jurisdiction in this Court; or, alternatively, that the judgment of the Supreme Court of Wisconsin (hereinafter "Wis. Sp. Ct.") appealed from herein be

affirmed, on the ground that it is manifest that the question on which the decision of the cause depends is so unsubstantial as not to need further argument.

CLAIMED JURISDICTION

This is a direct appeal from a final judgment of the Wis. Sp. Ct., the highest court of Wisconsin, with the claimed jurisdiction for the entertaining of such appeal being under 28 U.S.C. § 1257(2) (1966). See Jurisdictional Statement, p. 3.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

The constitutional provisions here involved are:

(a) That part of the Sixth Amendment to the United States Constitution which reads: "In all criminal prosecutions, the accused shall enjoy the right

. . . to have the Assistance of Counsel for his defence."

(b) That part of the Fourteenth Amendment to the United States Constitution which reads ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

(c) That part of article I, section 7, Wisconsin Constitution, which reads "In all criminal prosecutions the accused shall enjoy the right to be heard by . . . counsel; . . ."

(d) Article I, section 1, Wisconsin Constitution, which reads: "All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed."

The statute here invclved is that part of 28 U.S.C. § 1257 (1966) (hereinafter "§ 1257(2)") which reads as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, . . . of the United States, and the decision is in favor of its validity.

(Emphasis supplied.)

A second statute here involved is that part of sec. 751.12, Wis. Stats., which reads, "The state supreme court shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts . . . ."

The rule here involved is Rule 809.32(1), Wisconsin Rules of Appellate Procedure, promulgated by the Wis. Sp. Ct., and hereinafter called "sec. 809.32(1)." It reads:

> If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant and shall file a statement in the court of appeals that service has been made upon the defendant. The defendant may file a response to the brief within 30 days of service.

(Emphasis supplied.)

QUESTIONS PRESENTED

(1) Does jurisdiction exist for the entertaining of this appeal, where there was drawn in question in the Wis. Sp. Ct. the validity of a procedural, appellate rule of such court, on the ground of its alleged repugnancy to the United States Constitution, and the decision was in favor of its validity?

(2) If this Court should conclude it has jurisdiction over this appeal, should the judgment appealed from be affirmed on the ground that the question on which the decision in the cause depends is so unsubstantial so as to need no further argument?

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STATEMENT

In the Wis. Sp. Ct., appellant attacked as violative of the United States and Wisconsin Constitutions that portion of sec. 809.32(1) which requires the attorney therein described[1], who is of the opinion therein described, to include in the brief required by sec. 809.32(1) "a discussion of why the issue lacks merit," following the statement in such brief of "anything in the record that might arguably support the appeal."

In the Wis. Sp. Ct., appellant argued, both in his initial and reply brief, that sec. 809.32(1) "deprives relator of due process and effective assistance of counsel on appeal" insofar as it requires appellate counsel "to

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[1]Such attorney, hereinafter called "the defender," represents an indigent defendant at State expense.

provide the court with reasons why the appeal lacks merit." See Appendix pp. 101, 103, infra. Such Court held, however, "that adherence to sec. 809.32(1), Stats., does not operate to deprive defendant of any of his constitutional rights . . . ." See Appendix, p. 107, infra.

From the judgment containing such holding rendered on April 9, 1987, this appeal has been taken, with jurisdiction for this Court to entertain it claimed under § 1257(2).

ARGUMENT

I. THIS APPEAL SHOULD BE DISMISSED ON THE GROUND OF LACK OF JURISDICTION IN THIS COURT, FOR THE REASONS SHOWN BELOW.

As above shown, an appeal taken under § 1257(2) is from a final judgment or decree "rendered by the highest court

of a State in which a decision could be had," where there is "drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution . . . of the United States, and the decision is in favor of its validity." (Emphasis supplied.)

The appellee submits that sec. 809.32(1) does not come within the compass of the words "a statute of any state" as employed in § 1257(2), so that the jurisdiction claimed herein for this appeal does not exist.

Appellant cites eight cases[2], Federal and state, as supporting his jurisdictional claim herein. Jurisdictional Statement, p. 3. In so doing, he accords pride of place to Lathrop v. Donohue, 367 U.S. 820 (1961) (hereinafter "Lathrop"), a case of Wisconsin provenance. At first blush, Lathrop appears somewhat supportive of such

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[2]Of such eight cases, two, Williams v. Bruffy, 96 U.S. 176, 183 (1877) and Reinman v. Little Rock, 237 U.S. 171, 176 (1915) merely stand for the principle that within the meaning of § 1257(2) any "enactment," from "whatever source originating, to which a state gives the force of law" is "a statute of the state." King Mfg. Co. v. Augusta, 277 U.S. 100, 102-05 (1928) is helpful in that it clearly shows that "enactment" as referred to in such principle refers to an exercise of legislative power only, and in its statement that, "It of course rests with each state to determine in what form and in what agencies its legislative power may be exerted." 277 U.S. at 103. Of the five remaining cases, only Lathrop v. Donohue, 367 U.S. 820 (1961), discussed in argument herein, has any real relevancy with respect to the jurisdictional issue in question.

claim; but upon close scrutiny, and viewed in conjunction with certain Wisconsin case law, it is submitted that Lathrop assists materially in showing that this Court lacks jurisdiction herein.

In Lathrop, the jurisdictional question was whether this Court had jurisdiction under § 1257(2) over an appeal from a decision of the Wis. Sp. Ct. which upheld against constitutional attacks an order of such court which had integrated the Wisconsin State Bar by creating such bar "under Rules and Bylaws promulgated by the court." 367 U.S. at 821. In its jurisdictional holding in Lathrop, this Court said, inter alia,

> We are satisfied that this appeal is from an act legislative in nature and within § 1257(2). Integration of the Bar was effected through an interplay of action by the legislature and the court directed to fashioning a policy

> for the organization of the legal profession. The Wisconsin Legislature initiated the movement for integration of the Bar in 1943 when it passed the statute, chapter 345 of the Wisconsin Laws for that year, . . .

(Emphasis supplied; 367 U.S. at 825.) It then went on to point out that despite such legislative initiative, the Wis. Sp. Ct. "twice refused to order integration" (id., at 825-26), and further stated, "Nevertheless, the court in rejecting the first petition . . . recognized that its exercise of the power to order integration of the Bar would not be adjudicatory, but an action in accord with and in implementation of the legislative declaration of public policy.[3] . . ." (Footnote omitted; emphasis supplied; id. at 826.)

These key aspects of this Court's jurisdictional holding in Lathrop show great weight and deference accorded to

the recognition by the Wis. Sp. Ct. that its adoption of the rule there involved "would not be adjudicatory," but essentially legislative; and also shows this Court viewing as important to such holding that, "[i]ntegration . . . was effected through an interplay of action by the legislature and the court . . . ." Here, however, no such interplay produced the appellate, procedural rule in question. Moreover, State v. Holmes, 106 Wis. 2d 31, 44, 45, 315 N.W.2d 703 (1982) shows the Wis. Sp. Ct. clearly taking the position that in regulating, among other things, "practice and procedure" in the courts, it has acted "in the exercise of

its judicial power . . . ."[3] (Emphasis supplied; 106 Wis. 2d at 45.) Appellee assumes, on the basis of the deference shown by this Court in Lathrop to the judgment of the Wis. Sp. Ct. as to the non-judicial character of its order there involved, that this Court will accord the same deference to the recognition by such court, in State v. Holmes, supra, that when it adopts a procedural rule of the kind here in question, it exercises a

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[3]It is perhaps noteworthy that Wisconsin case law has long recognized that at the time of the adoption of the state constitution (1848) the power to regulate procedure in the courts "was considered to be essentially a judicial power, or at least not a strictly legislative power, . . ." Rules of Court Case, 204 Wis. 501, 510, 236 N.W. 717 (1931). See also Mosing v. Hagen, 33 Wis. 2d 636, 148 N.W.2d 93 (1967); In Matter of E.B., 111 Wis. 2d 175, 183, 330 N.W.2d 584 (1983). Today, however, as clearly recognized in State v. Holmes, the power of the Wis. Sp. Ct. to regulate practice and procedure is properly viewed as a purely judicial power.

judicial power, not a legislative one. If this Court accords such deference, it should, it is submitted, ineluctably follow that it would hold that it has no jurisdiction herein, under § 1257(2). As stated in Lathrop, "Under that section [§ 1257(2)], the legislative character of challenged state action . . . is decisive of the question of jurisdiction" (bracketed material supplied; 367 U.S. at 824); and here, appellee submits, the rule in question was promulgated by the Wis. Sp. Ct., in its own view and in any logical view, in an exercise of its judicial power.

In closing this argument, it must be noted that the judicial power of the Wis. Sp. Ct. to adopt a rule of the kind in question has long been codified, with such power now described in sec. 751.12, Wis. Stats. That such power, however,

has been so codified does not show it to be a legislative power. The Wis. Sp. Ct. in Rules of Court Case, supra, 204 Wis. at 503-10, rejected what it described as "the principal attack upon the validity of" sec. 251.18, Wis. Stats., a predecessor statute of sec. 751.12 "which was that such statute constituted a delegation by the legislature of its legislative power." What the procedural rule-making power recognized in sec. 751.12 is, of course, is one of those judicial powers, described as "incidental, implied, or inherent," which powers would and do exist in the Wis. Sp. Ct., regardless of whether they are codified. See State v. Holmes, 106 Wis. 2d at 44.

II. SHOULD THIS COURT CONCLUDE IT HAS JURISDICTION OVER THIS APPEAL, THE JUDGMENT APPEALED FROM SHOULD BE AFFIRMED ON THE GROUND THAT THE QUESTION ON WHICH THE DECISION IN THE CAUSE DEPENDS IS SO UNSUBSTANTIAL AS TO NEED NO FURTHER ARGUMENT.

Appellee submits that the question on which the decision of this cause depends is so unsubstantial, for several reasons, as to require no further argument herein, therefore warranting a summary affirmance of the judgment here involved.

The above-mentioned question is this: does the requirement of sec. 809.32(1) that a so-called "no merit" report or brief contain "a discussion of why the issue lacks merit" deprive the defendant referred to in such rule of any of his constitutional rights, including that of right to counsel under the Sixth Amendment, United States Constitution?

The first of the several reasons above mentioned, supporting summary affirmance of the judgment appealed from, is that Anders v. California, 386 U.S. 738 (1967), on which appellant placed his chief reliance in the Wis. Sp. Ct. (see p. 4, App. A to Jurisdictional Statement) clearly does not prohibit the above-mentioned "discussion" requirement of sec. 809.32(1), either expressly or by implication. The significant absence of such prohibition in Anders was noted by the Wis. Sp. Ct. See p. 8, App. A to Jurisdictional Statement.

The second of such reasons is that the decided weight of authority supports the holding of the Wis. Sp. Ct. that the "discussion" rule requirement here in question violates no constitutional right of the defendant in the criminal case wherein the defender files a "no merit"

brief subject to such requirement. Such weight of authority consists of the following: United States v. Edwards, 777 F.2d 364, 365 (7th Cir. 1985); Commonwealth v. Moffett, Mass., 418 N.E.2d 585, 592 (1981); Com. v. McClendon, 434 A.2d 1185, 1187-88 (S. Ct. of Pa. 1981); and State v. McKenney, 568 P.2d 1213, 98 Idaho 551 (1977). Against this array of cases, appellant can cite contra only Robinson v. Black, 812 F.2d 1084 (8th Cir. 1987).

To the cases supplying the weight of authority above shown, still another case may be added, namely, Suggs v. United States, 391 F.2d 971 (D.C. Cir. 1968). Such case first condemned as "not constitutionally adequate" a brief which was apparently a brief on the merits submitted by a defender on appeal, and not a "no merit" brief. It is clear that

such condemnation was grounded on the fact that such brief contained a "discussion", the "manifest thrust" of which was to show that there was "no substance" in the arguments of the defendant-appellant. 391 F.2d at 972. With this fact obviously in mind, the Court stated, ". . . with the instruction provided by Anders it is manifest that a brief like that filed by counsel in this case is not constitutionally adequate, even though the court purports to review the record independently. Counsel may not 'brief his case against his client.'" Id. at 973. Then turning, however, to the defender's "motion for leave to withdraw", the Court in Suggs concluded that such motion should be granted because the appeal brief in question "was transmitted to the Government, and indeed adopted by the

Government" (id. at 974); but in so doing, in a holding supportive of the "discussion" requirement here in question, it noted that in its "Statement for Counsel" it had "provided for an amicus memorandum,"[4] with express instructions to counsel, however, that such memorandum "should be available only to the court" (emphasis supplied; id.). The clear implication, then, of Suggs is that had the defender's brief on the merits therein, viewed as and serving as the

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[4]The description of such "amicus memorandum", which was required to be submitted to the court where an attorney had concluded that there was no non-frivolous issue, and moved to withdraw, was that it was "'a supporting memorandum analyzing the case legally, citing record references to the transcript if one is available and also citing any case or cases upon which counsel relied in arriving at his ultimate conclusion.'" 391 F.2d at 974. Obviously, such amicus memorandum would, inter alia, meet the "discussion" requirement of sec. 809.32(1).

required "amicus memorandum," been tendered only to the court, nothing constitutionally objectionable would have occurred. This implied holding, it is submitted, places Suggs among those cases which are supportive of the "discussion" requirement here involved.

The third of the reasons above-mentioned, enjoying parity with those two above discussed, is this: that the "discussion" requirement of sec. 809.32(1), and the meeting thereof, do not disserve the interests of the defendant referred to in such rule, but instead render valuable service to such interests in several ways. Where a defender provides such "discussion", both to the Wisconsin Court of Appeals and to the defendant, as required by sec. 809.32(1), it is submitted that he assists the defendant by way of advice in

two ways: first, the providing of such "discussion" does not bewilder, frustrate, and alienate the defendant by presenting him with a "no merit" brief taking what has been so aptly termed a "Janus-faced approach,"[5] i.e., stating that the defender believes an appeal would be frivolous and without any arguable merit, but then going on to point out a matter or matters in the record which might arguably support the appeal, without then explaining to the defendant and to the Court of Appeals "why the issue lacks merit"; and second, and of equal importance to the defendant, because the presentation of such "discussion", insofar as it is made to the Court of Appeals, assists the

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[5]As to this, see Commonwealth v. Moffett, Mass., cited supra, 418 N.E.2d at 590.

defendant by means of advice because it provides such court with a clear showing that the defender has made an examination and evaluation of the matter or matters which might arguably support the appeal, and is not seeking to withdraw from representation of the defendant on appeal without having provided him with what has been described as "the kind of professional evaluation of his appeal which competent retained counsel would have provided to his client." Nickols v. Gagnon, 454 F.2d 467, 472 (7th Cir. 1971). "Held to the same standards of competence and integrity as a private lawyer" (Polk County v. Dodson, 454 U.S. 312, 321 (1981)), the defender, in meeting the "discussion" requirement of sec. 809.32(1), Stats., is also complying with such standards, in the form of

advocacy then suitably and appreciably serving the needs of the defendant.

In closing this argument, two matters are worthy of note. They are:

(1) Where a defender is of the opinion that an appeal, in the language of sec. 809.32(1), "would be frivolous and without any arguable merit," then, it is submitted, his role as advocate for the defendant continues, but shifts in character from that of an argument-presenter to that of the attorney providing assistance by way of helpful advice; and such assistance logically and necessarily entails the presentation of the "discussion" required by sec. 809.32(1), which serves the interests of the defendant in the ways above shown.

(2) It is true, of course, that the defender, in providing the "discussion" required under sec. 809.32(1), has

obviously and necessarily engaged in a personal evaluation of "anything in the record that might arguably support the appeal," and has concluded that such matter or matters "lack merit." Such evaluation, however, necessarily made in providing the required "discussion," is under Anders manifestly not binding on the Court of Appeals, which has the exclusive power and duty to decide "whether the case is wholly frivolous." The defender, providing the mere "discussion" required by sec. 809.32(1), plainly does not seek to, and does not, intrude upon such exclusive judicial power and duty, which, under Anders, is exercised only "after a full examination of all the proceedings" by the court receiving the no merit brief. See Anders, 386 U.S. at 744.

CONCLUSION

For the reasons shown in Argument I, supra, the above stated motion to dismiss appeal should be granted; but should this Court conclude it has jurisdiction over this appeal, then the motion to affirm judgment above stated should be granted, for the reasons shown in Argument II, supra.

Respectfully submitted,

DONALD J. HANAWAY
Attorney General
State of Wisconsin

JAMES H. MCDERMOTT
Assistant Attorney General

DAVID C. RICE
Assistant Attorney General
(Counsel of Record)

Attorneys for Appellee

By: David C. Rice
David C. Rice
Assistant Attorney General

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-6823

APPENDIX OF APPELLEE
TO MOTION TO DISMISS APPEAL
Or, in the Alternative
TO AFFIRM JUDGMENT

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Appendix

P. 5, Brief and Appendix of Petitioner, filed in Wis. Sp. Ct. in Case No. 86-0172-W, wherein judgment appealed from herein was entered 101

P. 2, Reply Brief of Petitioner, filed in the above-mentioned Case No. 86-0172-W 102

Portion of judgment appealed from herein, consisting of p. 103 from such judgment as reported in 137 Wis. 2d 90-108, such judgment being rendered in St. ex rel. McCoy v. Appeals Ct. 103

granted the petition, insofar as it seeks a declaratory judgment with respect to the constitutionality of Rule 809.32(1) in an order dated March 27, 1986 (App. 137-138). The court also held the petition for a supervisory writ of prohibition in abeyance pending further order of the court (App. 138).

Further facts will appear in the argument.

ARGUMENT

RULE 809.32(1) DEPRIVES RELATOR OF DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL INSOFAR AS IT REQUIRES APPELLATE COUNSEL TO PROVIDE THE COURT WITH REASONS WHY THE APPEAL LACKS MERIT.

A defendant's right to counsel in a criminal case is guaranteed by the sixth amendment to the United States Constitution and Art. I, sec. 7 of the Wisconsin Constitution. This right to counsel includes the right to effective

representation of counsel. Powell v. Alabama, 287 U.S. 45, 53 (1932), State v. Koller, 87 Wis. 2d 253, 260-61, 274 N.W.2d 651 (1979).

The United States Supreme Court recently reaffirmed that if a state has created appellate courts as "an integral part of the . . . system for finally adjudicating the guilt or innocence of a defendant," the procedures used in deciding appeals must comport with the demands of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Evitts v. Lucey, 469 U.S. ___, 83 L.Ed. 2d 821, 827 (1985). See also Griffin v. Illinois, 351 U.S. 12, 18 (1956). The court also

(1967). Respondent's brief at p. 3-4. Yet, nowhere in Respondent's brief does respondent indicate why the no merit brief previously filed was not in compliance with Anders. Petitioner submits that the statement of facts contained in his brief is entirely accurate, and that Respondents' objection lacks merit.

ARGUMENT

RULE 809.32(1) DEPRIVES RELATOR OF DUE PROCESS AND EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL INSOFAR AS IT REQUIRES APPELLATE COUNSEL ON APPEAL TO PROVIDE THE COURT WITH REASONS WHY THE APPEAL LACKS MERIT.

The most notable thing about Respondent's brief is what is not contained therein. Respondent has attacked Petitioner's brief because it takes the position that it is contrary to Anders to inform the court why the issues lack merit in a no merit report. What is

strikingly absent from Respondent's brief is precisely where the United States Supreme Court in Anders requires defense counsel to provide such reasons. A review of Anders indicates that no such requirement was specified in that case, nor is it specifically allowed. 386 U.S. at 744. Thus, the entire premise relied upon by Respondent is lacking. Indeed, this court has even recognized that the procedure adopted in Wisconsin does not strickly adhere to Anders, but is instead a modification of the Anders procedure. State v. Mosely, 102 Wis. 2d 636, 660, 307 N.W.2d 200 (1981).

Respondent's position only has merit if, in the absence of language requiring or allowing defense counsel to provide reasons why a case lacks merit, Anders allows appellate counsel to evaluate the merits of the case for the court as

opposed to evaluating the merits for the client. As petitioner has pointed out in his brief-in-chief at pp. 6-7, the Court in Anders ruled that that job is for the court, not counsel. 386 U.S. at 744.

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A final consideration which we believe is important to our decision is one which has been alluded to already, namely, the discussion requirement serves as a significant administrative aid to the reviewing court. It first provides a basis for the reviewing court to judge whether an appeal is meritorious. The brief in support of appeal, combined with the "no-merit" discussion, gives the court far more than just a "cold record" to look at; rather, the court has before it both the arguments in support of an appeal and a statement which at least refers to case authorities or factual references which do not support an appeal. Thus, the court has a substantial base of authority to refer to

in making its own, independent evaluation of the case. This makes it less likely that the court will overlook important legal authorities which would either support or militate against continued appellate proceedings. Hence, the discussion requirement operates as a judicial aid, serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner. With an increase in the number of criminal appeals, this concern should be obvious.

Because we find that adherence to sec. 809.32(1), Stats., does not operate to deprive defendant of any of his constitutional rights, and given the other significant considerations we have enumerated, we affirm the constitutionality of the Wisconsin procedure.

Therefore, the petition for a supervisory writ of prohibition is denied.

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lack of concern in the client's cause. Nor can that fact be assigned as a reason for concluding that the client did not receive this constitutionally protected right of representation." 495 Pa. at 473-74, 434 A.2d at 1188.

SUPREME COURT, U.S.
FILED
NOV 30 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5002

In The

Supreme Court of the United States

October Term, 1987

ELLIS T. McCOY, ETC.,

Appellant,

vs.

WISCONSIN COURT OF APPEALS, DISTRICT I,

Appellee

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

JOINT APPENDIX

LOUIS B. BUTLER, JR.
Assistant Wisconsin
Public Defender
819 North Sixth Street,
Room 821
Milwaukee, Wisconsin 53203
(414) 227-4891
Counsel for Appellant

DONALD J. HANAWAY
Attorney General
State of Wisconsin

JAMES H. McDERMOTT
Assistant Attorney General

DAVID C. RICE
(Counsel of Record)
Assistant Attorney General

Wisconsin Dept. of Justice
Post Office Box 7857
Madison, Wisconsin 53707
(608) 266-6823
Counsel for Appellee

Statement As to Jurisdiction filed May 22, 1987
Probable Jurisdiction Noted October 5, 1987

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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT 1

Case No. 84-929-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ELLIS T. McCOY,

Defendant-Appellant.

MOTION TO DETERMINE CONSTITUTIONALITY OF RULE 809.32(1) AND TO CLARIFY SCOPE OF ATTORNEY'S REPRESENTATION ON APPEAL

Now comes the above-named defendant, Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, and hereby moves this court for an order determining the constitutionality of Rule 809.32 (1) and to clarify the scope of the attorney's representation, pursuant to Rule 809.14, on the following grounds:

1. On January 24, 1984, the above-name attorney was appointed to represent the above-named defendant for purposes of appeal. The final transcript was filed April 5, 1984, and a notice of appeal was filed May 4, 1984.

2. After doing research in preparation for filing the brief in this action, which would be due on August 20, 1984 pursuant to Rule 809.30(1)(f) and an extension granted by this court on July 24, 1984, this attorney has concluded that further appellate proceedings on behalf of Mr. McCoy would be frivolous and without any argu-

able merit within the meaning of *Anders of California,* 386 U.S. 738 (1967) and Rule 809.32(1).

3. This attorney discussed the matter by telephone with Mr. McCoy on August 10 and 13, 1984. Mr. McCoy was advised that his options included voluntarily dismissing the appeal, proceeding with the appeal *pro se* or requiring this attorney to file a no merit report. Mr. McCoy has asked this attorney to file a no merit report.

4. The United States Supreme Court in *Anders, supra,* has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae,* 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

386 U.S. at 745.

5. The Wisconsin Supreme Court, consistent with *Anders,* has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. *Cleghorn v. State,* 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972).

6. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders,* the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

7. While it is clear pursuant to *Anders* that a no merit brief is required when an attorney reaches that determination and the defendant wishes to pursue his or her appeal, defendant submits that the portion of sec. 809.32 (1) which requires a discussion of why the appeal lacks merit would infringe on defendant's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by *Anders,* but would be in the awkward position of arguing why his client's appeal lacks merit. This would be contrary to the mandate of *Anders* that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, defendant submits that a discussion of why any issue lacks merit would violate the sixth amendment.

8. Defendant submits that a no merit report consistent with *Anders* and with the remainder of Rule 809.32(1) would protect the interests of the client while informing the court that further proceedings would be frivolous. The attorney would be able to present the court with any issue which might arguably support the appeal, giving the court, not counsel, an opportunity to decide whether the appeal is frivolous. Such a procedure would not put the attorney in the position of arguing against his client.

9. This attorney, while believing the portion of Rule 809.32(1) which requires a discussion of why the issue lacks merit to be unconstitutional, will file whatever type of no merit report this court determines to be appropriate. This attorney suggests that the order determining the constitutionality of the challenged portion of the Rule be published. The no merit report will be due on October 2, 1984, based on the service of the transcripts, not including the time that is tolled due to the filing and determination of this motion.

WHEREFORE, this attorney respectfully requests that this court determine the constitutionality of that portion of 809.32(1) which requires a discussion of why any issue lacks merit, and clarify the scope of this attorney's representation on appeal.

Dated this 14 day of August, 1984.

Respectfully submitted,

/s/ LOUIS B. BUTLER, JR.
Assistant State Public Defender

Attorney for Defendant-Appellant.

DISTRICT I

Office of the Clerk
COURT OF APPEALS
Of Wisconsin

Madison, September 7, 1984

(Title omitted in printing)

ORDER

Before Wedemeyer, P.J., Moser and Sullivan, JJ.

The defendant, by his attorney, has moved the court for an order determining the constitutionality of Rule 809.32(1), Stats., and clarifying the scope of an attorney's representation in cases where the attorney concludes that further appellate proceedings on behalf of his client would be frivolous and without arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967). The defendant's counsel states that he believes that the portion of Rule 809.32(1) which requires a discussion of why the appeal lacks merit infringes on the defendant's sixth amendment right to counsel, but that he will file whatever type of no merit report this court determines to be appropriate.

The motion is denied. The general rule is that courts do not decide abstract principles of law, *City of Racine v. J-T Enterprises of America, Inc.,* 64 Wis.2d 691, 700, 221

N.W.2d 869, 874 (1974), or render advisory opinions, *Smith v. Pershing,* 10 Wis.2d 352, 357, 102 N.W.2d 765, 768 (1960). Judicial restraint dictates not passing on an issue until the facts of the proper case present a justiciable controversy. *State ex rel. Deisinger v. Treffert,* 85 Wis.2d 257, 271, 270 N.W.2d 402, 409 (1978). A justiciable controversy constitutes a controversy in which a claim of right is asserted against one who has an interest in contesting it. *Pension Management, Inc. v. DuRose,* 58 Wis.2d 122, 128, 205 N.W.2d 553, 555 (1973). The justiciable controversy requirement compels the courts to refuse to determine hypothetical or future rights. *See id.* at 128, 205 N.W.2d at 555-56.

Based on these standards, we conclude that the relief requested in the motion should not be granted. The motion in effect requests this court to render an advisory opinion informing the defendant's counsel of whether this court would conclude that a no merit report filed in accordance with Rule 809.32(1) deprived the defendant of assistance of counsel as required by the sixth amendment to the U.S. Constitution. Since a no merit report has not yet been filed, the defendant has not and cannot yet claim that he was deprived of his right to assistance of counsel. Consequently, no justiciable controversy exists involving the constitutionality issue. The constitutionality issue therefore cannot properly be addressed by this court at this time.

Upon the foregoing reasons,

IT IS ORDERED that the motion to determine the constitutionality of Rule 809.32(1), Stats., and to clarify the scope of representation is denied.

Marilyn L. Graves,
Clerk of Court of Appeals

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

Case No. 84-929-CR

(Title omitted in printing)

BRIEF OF DEFENDANT-APPELLANT

LOUIS B. BUTLER, JR.
Assistant State Public Defender

230 West Wells Street, Room 500
Milwaukee, Wisconsin 53203

Attorney for Defendant-Appellant

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INTRODUCTION

This attorney has concluded that further appellate proceedings on behalf of Mr. McCoy would be frivolous and without any arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967) and Rule 809.32(1). The following brief has been prepared in compliance with *Anders.* However, because this attorney believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is directly contrary to *Anders* and unconstitutional, this attorney cannot ethically take a position which would argue against his client or act as *amicus curiae. See* S.C.R. 20.34(1)(c) and (2)(a) (1984).

The United States Supreme Court in *Anders, supra,* has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae,* 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

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386 U.S. at 745.

The Wisconsin Supreme Court, consistent with *Anders,* has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. *Cleghorn v. State,* 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972).

Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders,* the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

While it is clear pursuant to *Anders* that a no merit brief is required when an attorney reaches that determination and the defendant wishes to pursue his or her appeal, defendant and this attorney submit that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on defendant's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by *Anders,* but would be in the awkward position of arguing why his client's appeal lacks merit. This would be contrary to the mandate of *Anders*

that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, defendant and this attorney submit that a discussion of why any issue lacks merit would violate the sixth amendment.

Defendant and this attorney submit that a no merit report consistent with *Anders* and with the remainder of Rule 809.32(1) would protect the interests of the client while informing the court that further proceedings would be frivolous. This attorney would be able to present the court with any issue which might arguably support the appeal, giving the court, not counsel, an opportunity to decide whether the appeal is frivolous. Such a procedure would not put the attorney in the position of arguing against his client. This attorney has therefore prepared this brief in compliance with *Anders*, and the brief will not include a discussion of why any issue lacks merit. This approach fulfills this attorney's ethical obligation to protect his client's sixth amendment right to counsel on appeal. S.C.R. 20.34(1)(c) and (2)(a) (1984).

ISSUES PRESENTED

1. Did the failure by the nurse at the House of Correction to give defendant the correct test to determine whether he had gonorrhea violate his right to due process and a fair trial when the test was pursuant to a search warrant?

Trial court answered: No.

2. Did the *ex parte* hearing on the application for a search warrant and the execution of the search warrant at

the jail outside attorney's presence violate defendant's sixth amendment right to counsel?

Not answered by the trial court.

3. Was the evidence presented at trial sufficient to support a conviction for one count of second degree sexual assault and one count of abduction?

Trial court answered: Yes.

4. Was the sentence excessive?

Not answered by the trial court.

POSITION ON ORAL ARGUMENT AND PUBLICATION

This is an *Anders* brief, and as such, is not usually appropriate for publication. Nevertheless, because a portion of Wisconsin's No Merit Rule may be unconstitutional, a decision by this court would either modify the existing rule or clarify it. Accordingly, publication would be warranted.

Because of the complex nature of the question of an attorney's responsibility when the client wishes to pursue a no merit appeal, oral argument is requested as to how a no merit report should be prepared.

STATEMENT OF THE CASE

This matter is before the court on appeal, pursuant to Rule 809.32(1), from the judgment of conviction and sentence entered December 2, 1983, of the appellant, in circuit court, Milwaukee County, Honorable William A. Jennaro presiding. Appellant McCoy (hereinafter "defendant")

was convicted of one count of second degree sexual assault, contrary to sec. 940.225(2)(a), and one count of abduction, contrary to sec. 940.32(1), Stats.

Upon conviction, defendant was sentenced to six years, each count, to be served consecutively at the Dodge Correctional Institute at Waupun.

STATEMENT OF FACTS

Ellis T. McCoy was charged with one count of second degree sexual assault and one count of abduction, contrary to secs. 940.225(2)(e) and 940.32(1), Stats. (2: 1-2).

On July 8, 1982, the state applied for a search warrant to obtain blood, saliva, head and pubic hair and a test for the possibility of venereal disease from the defendant (23: 2). A Detective Doyle learned that the victim, C.D., contracted gonorrhea as a result of the attack (23: 5). The state asserted that there is a possible leaving behind of seminal fluid from the assailant to the victim, and that a blood type could be determined from the fluid (23: 6). For comparison purposes, the Wisconsin Regional Crime Laboratory would need a blood sample, pubic and head hair samples and saliva (23: 7). Because Mr. McCoy was in custody, the test could be taken in the nurse's office of the Milwaukee County Jail by the nurse (23: 7). The officer testified that the nurse had taken numerous samples from other persons in the past (23: 7), and had training and experience in taking those samples. (23: 8).

The court found probable cause for the issuance of the search warrant to obtain, under medical supervision by a doctor or nurse qualified to perform the functions, the various samples (23: 9-10). The warrant specifically authorized the taking of blood and saliva samples, head and pubic hair samples and appropriate testing for gonorrhea by the nurse "pursuant to approved medical procedures" (22: 1). The transcript reflects that no appearance was made by the defendant or his attorney at the hearing (23: 1), which occurred July 8, 1982, after the preliminary hearing of June 19, 1982 (10: 1, *et seq*).

After receiving a doctor's report from Atlanta, the state decided to proceed with the prosecution (12: 3-4). The assistant district attorney thought that the medical evidence or opinions would dispose of the case, but found that they did not because the wrong test was performed (12: 3-4).

At trial, Nurse Mary Schuknecht of the County Jail testified that she came in contact with Ellis McCoy on July 8, 1982 pursuant to a search warrant (14: 25). She collected blood, saliva, head and pubic hair samples and conducted a test normally done by the jail for gonorrhea (14: 26). That test involved taking a swab of the urethra, putting it on a lab slide and sending it to the Milwaukee Health Department (14: 26). There were no facilities in the County Jail to take gonorrhea samples to be used for a culture as opposed to the slide analysis on that date (14: 27). All that was needed was a culture medium container (14: 29).

The results from the test that was done was negative for gonorrhea (14: 29).

Robert Bagley, a bacteriologist for the City of Milwaukee Health Department, testified that a culture was the preferred procedure for gonorrhea testing because it was a specific test for gonorrhea (14: 31-32). The "gram

stain" slide method at best was only presumptive evidence of gonorrhea (14: 31-32, 35-36).

The test performed on Mr. McCoy was largely inconclusive (14: 35-36). There were very few cells on the slide resembling gonorrhea (14: 38-40).

Dr. Michael Dailey testified that it was not always necessary to receive treatment in order to get rid of gonorrhea (14: 49). One can shed the organism by going to the bathroom (14: 49-50).

The victim, C.D., had gonorrhea (14: 50). The testing of Mr. McCoy does not establish either way whether he had gonorrhea or not (14: 54). That is because of the possibility of error due to the slide test (14: 57). A culture would have been the appropriate test (14: 58).

Mary Beth Varriale testified that the vaginal swab of C.D. was negative for the presence of semen or spermatozoa (15: 76). Nc seminal stains were found on a pair of her blue panties, and the only hair found on the panties belonged to C.D. (15: 77-78). However, another pair of panties had a stain containing intact spermatozoa (15: 79). Ms. Varriale attempted to individualize the stain as to the A, B, or O blood group of the person who contributed the semen, but the results were inconclusive (15:81). She did not find any of Mr. McCoy's hair or saliva on the victim's clothing (15: 85).

C.D. testified that at approximately 10:00 p.m. she received a phone call from the defendant (15: 92). He asked if her sister and mother were home, and when she said no, he asked if he could come by and help plan a birthday party for his girlfriend (15: 94). C.D. told him

he could not come over (15: 95). She called her mother on the phone and told her she was scared, so her mother told her to lock the doors and go upstairs (15: 96).

Five minutes later, C.D. saw Mr. McCoy standing outside a window (15: 96-97). McCoy rang the doorbell, and C.D. told him to leave, but he would not leave (15: 99). McCoy told that he was planning a surprise party for his girlfriend and wanted a pencil and paper (15: 101). He also wanted a kiss (15: 102). She gave him the paper and locked the door (15: 103-104). Five minutes later, she looked to see if he had gone, opening the door (15: 104). McCoy grabbed her, took her to the car, drove to a dark place and assaulted her (15: 106-114). Her glasses were knocked off during the struggle (15: 106-107).

After the assault, McCoy went to a gas station to get gas (15: 211). There were other people at the station, but C.D. did not get out of the car or run away, nor did she tell anyone else she had been assaulted (16: 224). He told her not to tell anyone (16: 235). He also called later to ask her if she was alright and told her to take a shower (16: 249).

Detective Patrick Doyle, after arriving at the victim's home found a package of Salem cigarettes and a lense and the left bow for C.D.'s eyeglasses in the yard (17:5).

Ellis McCoy admitted going to C.D.'s house and taking her to the gas station (17: 36-39). He denied sexually touching C.D. (17: 44-45). He also has a defect in his right arm which prevents him from lifting anything heavy (17:65).

Leo Draveling, who used to live with the victim's mother, was of the opinion that C.D. was untruthful, and

that her fourth grade teacher and superintendent of her school were of the same opinion (17: 87, 90-93).

The trial court in evaluating the evidence[1] recognized that the gonorrhea test done was unsatisfactory but found nevertheless that the defendant was guilty beyond a reasonable doubt (17: 133-137). Upon conviction, Mr. McCoy was sentenced to indeterminate terms of not more than six years, each count, consecutive to each other, for the abduction and sexual assault charges (18: 14).

Further facts will appear in the argument.

ARGUMENT

I. THE FAILURE TO CONDUCT THE APPROPRIATE TEST TO DETERMINE WHETHER DEFENDANT HAD GONORRHEA RESULTED IN THE DESTRUCTION OF EVIDENCE MATERIAL TO THE DEFENSE.

The Wisconsin Supreme Court has ruled that the destruction of evidence material to the defense violates due process. *State v. Amundson,* 69 Wis. 2d 554, 577-580, 230 N.W.2d 775, 788 (1975). In reaching its decision, the court adopted the reasoning set forth in *United States v. Bryant,* 142 U.S. App. D.C. 132, 439 F.2d 642 (D.C. Cir. 1971).

Other decisions which have adopted the *Bryant* reasoning have set forth a three-pronged test to determine whether the destruction of material evidence violates due process: (1) the state's bad faith or negligence; (2) the

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[1] The jury had been waived by the defendant against counsel's advice mid-trial (15: 64-67).

importance of the evidence; and (3) the other evidence of guilt adduced at trial. *Johnston v. Pittman,* 731 F.2d 1231, 1234 (5th Cir. 1984); and *Armstrong v. Collier,* 536 F.2d 72, 78 (5th Cir. 1976). Applying this test to the facts of this case, there can be no doubt that the failure to conduct the correct gonorrhea test was due to the state's negligence, as the trial court indicated that the test conducted was unsatisfactory (17: 133-137). There can also be no question that the correct test was material and important to the defense, as the victim had gonorrhea and the inconclusive test indicated that there was no presence of gonorrhea in the defendant (14: 29, 31-36, 38-40, 50). If the defendant did not have gonorrhea, then not only did he probably not commit the assault on the victim, but the victim would now have a motive for falsely accusing defendant in order to explain how she contracted gonorrhea in the first place. *State ex rel. Lyons v. DeValk,* 47 Wis. 2d 200, 204-206, 177 N.W.2d 106 (1970). Thus, the only question to be determined is whether the other evidence at trial was so lacking that the defendant was deprived of due process.

Defendant submits that absent the correct test for gonorrhea, the remaining evidence at trial is so lacking in probative value that a sufficient question has been raised as to whether he had gonorrhea. Defendant submits that if he did not have the disease, then he could not have committed the offense. Therefore, a new trial should be ordered as to both counts.

II. THE TAKING OF BLOOD, HAIR, SALIVA AND GONORRHEA TEST SAMPLES OUTSIDE THE DEFENSE ATTORNEY'S PRESENCE, FOLLOWING AN *EX PARTE* PROCEEDING WHEN THE SEARCH WARRANT WAS APPLIED FOR, VIOLATED DEFENDANT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

The complaint in this action was filed June 21, 1982. The information in this action was filed June 29, 1982 (3: 1). Thus, the defendant's sixth amendment right to counsel attached, as formal charging had already taken place. *Brewer v. Williams,* 430 U.S. 387, 398 (1977).

The search warrant proceeding took place July 8, 1972 (23: 1, *et seq.*). The record reflects that no appearance was made by defendant or counsel at the hearing (23: 1). Moreover, there is nothing in the record to indicate that defense counsel was present when the warrant was executed at the jail.

Sec. 971.04 provides the defendant has a right to be present at any evidentiary hearing. Evidence was taken during the search warrant proceeding, yet neither defendant nor counsel were present. Thus, defendant submits that his sixth amendment right to counsel and his statutory right to be present were violated when the proceedings were conducted *ex parte.*

Defendant recognizes that normally, pre-search proceedings are *ex parte* and conducted in secrecy, as the subject of the search should not be tipped off to the application lest he destroy or remove evidence. Sec. 968.21. *See Franks v. Delaware,* 438 U.S. 154, 169 (1978). However, defendant's case falls within a different category

than the normal search, as formal proceedings have already been initiated against him. Second, there is no chance that the evidence can be removed or destroyed, as defendant is in custody. Finally, an adversary hearing should be required before the warrant is issued because of the nature of the search and the type of intrusion the defendant is facing. *Schmerber v. California,* 384 U.S. 757, 768 (1966); *United States v. Crowder,* 543 F.2d 312, 316 (1975), *cert. denied,* 429 U.S. 1062 (1977).

Had defense counsel been present at the search warrant proceeding, he might have pointed out to the court exactly what the appropriate test would be for gonorrhea, so that the court would have been in a position of specifying what test should be done. Alternatively, had counsel been present at the jail when the warrant was executed, then he could have objected to the procedure that was actually done, been in a position to know that the test was the wrong one, and either challenge the execution of the warrant or conduct independent tests.

Defendant is mindful of the fact that no objection was made either to the *ex parte proceeding* or to the absence of counsel's presence at the jail, but submits that because the error affects the integrity of the factfinding process, this court must review it as plain error. Sec. 901.03(4), Stats. *See also State v. Gustafson,* 119 Wis. 2d 676, 693, — N.W.2d — (1984); and *State v. Baldwin,* 101 Wis. 2d 441, 446, 304 N.W.2d 742 (1981). Thus, defendant submits that a new trial be ordered in this action as to each count.

III. THE EVIDENCE IS INSUFFICIENT TO SUPPORT A CONVICTION.

C.D. had gonorrhea. The test given to defendant, while inconclusive, was negative for gonorrhea. Thus, if defendant did not have the disease, as the test results indicate, then C.D. had a motive for falsifying her testimony.

The only corroboration for the assault, the broken glasses and the cigarette package, could have easily been manufactured by C.D. in an attempt to explain her disease. The semen found on her underpants cannot be tied to him, and there was no way to tell the age of the stain. Thus, that evidence is not corroborative of the assault and abduction. Given Leo Draveling's opinion that he, C.D.'s fourth grade teacher and the superintendent of her school thought she was untruthful (17: 87, 90-93), defendant submits that this case falls within the rule of *Syvock v. State*, 61 Wis. 2d 411, 414-416, 213 N.W.2d 11 (1973). Accordingly, defendant submits that the evidence is insufficient to support a conviction in this action.

IV. THE SENTENCE IN THIS ACTION IS EXCESSIVE.

Defendant recognizes that ordinarily appellate courts will not interfere with the sentencing discretion of the trial court. *Ocanas v. State*, 70 Wis. 2d 179, 233 N.W.2d 457 (1975). Nevertheless, defendant submits that even if this court affirms the convictions in this case, the abduction and the sexual assault arose out of the same set of facts and same incident, so that concurrent sentences are warranted. Thus, this court should modify the two six year sentences to concurrent terms.

CONCLUSION

In light of the foregoing, defendant respectfully requests that this court reverse the judgment of the trial court and order a new trial as to each count. Alternatively, defendant requests that his sentences be modified to concurrent terms.

In addition, defendant respectfully requests that this court determine the constitutionality of Rule 809.32(1) and the scope of his attorney's representation under that rule.

Finally, this attorney respectfully requests permission to withdraw as counsel.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant State Public Defender

230 West Wells Street, Room 500
Milwaukee, Wisconsin 53203

Attorney for Defendant-Appellant

COURT OF APPEALS
Of Wisconsin
State Capitol
P.O. Box 1688
Madison, Wisconsin 53701-1688
Telephone (608) 266-1880

Marilyn L. Graves
Clerk

October 22, 1984

Ellis T. McCoy
P.O. Box 147
Fox Lake, WI 53933

RE: #84-929-CR-NM State v. Ellis T. McCoy
(T.C. #K-3561)

Dear Mr. McCoy:

I have received from your appointed counsel a report that further appellate proceedings in your case would be frivolous and without any arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967). A copy of that report was served on you. In accordance with Rule 809.32(1) you have 30 days from the service of that report to file any response you may wish the court to consider.

Upon receipt of the response, we will transmit to the court the trial court record, the no merit brief and any response you have filed. The court will consider all issues raised by the report and your response. You will be promptly notified of any action taken in this matter.

Yours very truly,

/s/ Marilyn L. Graves
Clerk of Court of Appeals

cc: Louis B. Butler, Jr.
Kirbie Knutson
Enclosure (Rule 809.32)

DISTRICT I

Office of the Clerk
COURT OF APPEALS
Of Wisconsin

(Title omitted in printing)

84-929-NM

Before Wedemeyer, P.J., Moser and Sullivan, JJ.

Ellis McCoy was found guilty of one count of second-degree sexual assault and one count of abduction. Assistent State Public Defender Louis Butler was appointed to represent McCoy on appeal. Butler filed a notice of appeal on McCoy's behalf but subsequently concluded that there was no merit to the appeal.

Rule 809.32(1), Stats., provides that:

> If an attorney appointed under s. 967.06(3) or Rule 809.30 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967), the attorney shall file with the court of appeals three copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service.

Butler has now filed his brief in this matter. The brief suggests four issues which might arguably support the appeal but does not indicate why those issues lack merit. Accordingly, the brief is not in compliance with Rule 809.32(1), Stats.

Upon the foregoing reasons,

IT IS ORDERED that the brief previously filed in this matter is struck. Assistant State Public Defender Louis Butler is directed to file a brief in compliance with Rule 809.31(1), Stats., within fifteen days of the date of this order.

Marilyn L. Graves
Clerk of Court of Appeals

STATE OF WISCONSIN
IN SUPREME COURT
CASE NO. .....

STATE OF WISCONSIN EX REL.
ELLIS T. MCOY,

Relator,

v.

From: Appeal No. 84-929-CR-NM
Trial No. K-3561

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Respondent.

PETITION FOR SUPERVISORY WRIT OF PROHIBITION AND DECLARATION OF RELATOR'S RIGHTS

The petition of Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, pursuant to Rule 809.71, Stats., hereby petitions this court for a supervisory writ of prohibition prohibiting the court of appeals from striking the brief previously filed and prohibiting the court of appeals from ordering counsel to provide reasons why the issues presented in that brief lack merit, and petitions this court, pursuant to Rule 809.70, Stats., to determine the constitutionality of Rule 809.32(1) and whether the rule violates relator's sixth amendment right to counsel, on the following grounds:

1. The petitioner, Louis B. Butler, Jr., represents the relator, in the case of *State of Wisconsin v. Ellis T. McCoy, Case No.* 84-929-CR-NM, now pending in the court of appeals, District I.

2. Relator moved for a determination of the constitutionality of Rule 809.32(1) before the court of appeals in a motion dated August 14, 1984.

3. The court of appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." See September 7, 1984 order, p. 2 (attached).

4. A "No Merit" brief was filed by this attorney on October 22, 1984, which was in compliance with *Anders v. California,* 386 U.S. 738 (1967) and the subsequent decision of *Evitts v. Lucey,* 469 U.S. —, 83 L.Ed.2d 821, 828 (1985), but not in compliance with Rule 809.32(1).

5. The court of appeals, District I, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included. The court also ordered that petitioner file a new brief within 15 days of the date of that order which is in compliance with the Rule.

6. The United States Supreme Court in *Anders, supra,* has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae,* 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accom-

panied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

7. The Wisconsin Supreme Court, consistent with *Anders,* has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. *Cleghorn v. State,* 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). This Court has not as yet had an opportunity to review the current procedure since the creation of Rule 809.32(1).

8. The United States Supreme Court very recently has reaffirmed its prior holding in *Anders,* stating that the attorney " . . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts v. Lucey,* 83 L.Ed.2d at 828.

9. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders,* the attorney shall

file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

10. Petitioner and relator submit that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on relator's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be directly contrary to the mandates of *Anders* and *Lucey* that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, petitioner and realtor submit that a discussion of why any issue lacks merit violates the sixth amendment.

11. Because petitioner believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is unconstitutional, petitioner cannot ethically take a position which would argue against his client or act as a friend of the court. This Court's rules require that while serving as an advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. SCR 20.34(1)(c) (1984). This Court has also determined that an advocate may urge any permissible construction of the law favorable to his or her client, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification or reversal of the law. SCR 20.34(2)(c) (1984).

12. An order by this Court prohibiting the court of appeals from striking the brief previously filed and from

ordering counsel to provide reasons why the issues lack merit is necessary in order to protect relator's sixth amendment right to counsel. It would resolve the conflict that exists with the Wisconsin Rule and United State Supreme Court decisions.

13. An order by this Court as stated in para. 12 is necessary to prevent petitioner from violating this Court's ethical rules.

14. Petitioner would note that the No Merit procedure for petitions for review is substantially different from that for appeals, and that this Court does not require an attorney to provide reasons why a petition for review lacks merit. *Compare* 809.32(1) and (4).

15. Petitioner submits that the brief already filed in this action meets all of the requirements set forth by *Anders* and *Lucey*.

16. A declaration of relator's sixth amendment right to counsel and whether Rule 809.32(1) violated that right is necessary before any new brief is written to prevent petitioner from violating relator's sixth amendment right to counsel.

17. Petitioner and relator currently have no other adequate remedy at law, other than this petition, to protect relator's rights and prevent petitioner from violating his ethical duty.

WHEREFORE, petitioner respectfully requests that this Court strike that portion of rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, prohibit the court of appeals from striking the brief already filed, and prohibit the court

of appeals from requiring petitioner to provide reasons why relator's appeal lacks merit.

Dated this 23rd day of April, 1985.

Respectfully submitted,

/s/ Louis B. Butler, Jr.
Assistant State Public Defender

819 North Sixth St., Room 821
Milwaukee, Wisconsin 53203

/s/ Eric Schulenberg
Chief, Appellate Division

340 W. Washington Ave.
P.O. Box 7862
Madison, Wisconsin 53707

OFFICE OF THE CLERK
SUPREME COURT
STATE OF WISCONSIN

Madison, May 8, 1985

(Title omitted in printing)

Order

Case No. 85-07181-W

On April 24, 1985 Assistant State Public Defender Louis B. Butler, Jr., filed a petition for a supervisory writ to prohibit the Court of Appeals, District I, from striking the brief he filed in an appeal pending in that court and prohibiting it from ordering him to provide reasons why the issues presented in that brief lack merit. The petition also asks this court, pursuant to sec. (Rule) 809.70, Stats., to determine the constitutionality of sec. (Rule) 809.32(1), Stats.

In the pending appeal, the petitioner moved the Court of Appeals for a determination of the constitutionality of sec. (Rule) 809.32(1), Stats., and the Court of Appeals denied that motion by order of September 7, 1984, on the ground that, because a no merit report had not been filed, "no justiciable controversy exists involving the constitutionality issue. The constitutionality issue therefore cannot properly be addressed by this court at this time." From this it appears that the petitioner is not entitled to a supervisory writ and declaratory relief from this court for the reason that he has an adequate remedy in the Court of Appeals by renewing his motion for a determination of the constitutionality of sec. (Rule) 809.32(1), Stats.

IT IS ORDERED, pursuant to sec. (Rule) 809.71, Stats., that the petition for supervisory writ and declaratory relief is denied.

Shirley S. Abrahamson, J., dissents.

MARILYN L. GRAVES
Clerk of Supreme Court

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 84-929-CR-NM

ELLIS T. McCOY,

Defendant-Appellant.

MOTION TO DETERMINE CONSTITUTIONALITY OF RULE 809.32(1) AND TO CLARIFY SCOPE OF ATTORNEY'S REPRESENTATION ON APPEAL

NOW COMES the above-named defendant, Ellis T. McCoy by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, and hereby moves this court for an order determining the constitutionality of Rule 809.32(1) and to clarify the scope of this attorney's representation, pursuant to Rule 809.14 and the order of the Wisconsin Supreme Court in *State ex rel. McCoy v. Court of Appeals, District I*, No. 85-0781-W, on the following grounds:

1. Defendant moved for a determination of the constitutionality of Rule 809.32(1) before the court of appeals in a motion dated August 14, 1984.

2. The Court of Appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." *See* September 7, 1984 order, p. 2 (attached).

3. A "No Merit" brief was filed by this attorney on October 22, 1984, which was in compliance with *Anders v. California,* 386 U.S. 738 (1967) and the subsequent decision of *Evitts v. Lucey,* 469 U.S. —, 83 L.Ed.2d 821, 828 (1985), but not in compliance with Rule 809.32(1).

4. The Court of Appeals, District I, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included. The court also ordered that defendant file a new brief within 15 days of the date of that order which is in compliance with the Rule (attached).

5. Defendant filed a petition for supervisory writ of prohibition and declaration of relator's rights in the Wisconsin Supreme Court in *State ex rel. McCoy v. Wisconsin Court of Appeals, District I,* No. 85-0781-W, dated April 23, 1985.

6. The Wisconsin Supreme Court denied that petition on May 8, 1985, ruling that petitioner had an adequate remedy at law by renewing the motion for a determination of the constitutionality of the Rule in the Court of Appeals (attached).

7. The United States Supreme Court in *Anders, supra,* has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae,* 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request

permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

8. The Wisconsin Supreme Court, consistent with *Anders,* has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. *Cleghorn v. State,* 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). The appellate courts of this state have not as yet had an opportunity to review the current procedure since the creation of Rule 809.32(1).

9. The United States Supreme Court very recently has reaffirmed its prior holding in *Anders,* stating that the attorney ". . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts v. Lucey,* 83 L.Ed.2d at 828.

10. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders*, the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

11. Defendant submits that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on his sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be directly contrary to the mandates of *Anders* and *Lucey* that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, defendant submits that a discussion of why any issue lacks merit violates the sixth amendment.

12. Because counsel believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is unconstitutional, counsel cannot ethically take a position which would argue against his client or act as a friend of the court. The Wisconsin Supreme Court's rules require that while serving as an advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. SCR 20.34(1)(c) (1984). The Court has also determined that an advocate may urge any permissible construction of the law favorable to his

or her client, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification or reversal of the law. SCR 20.34(2)(c) (1984).

13. An order by this Court determining the constitutionality of the no merit rule is necessary in order to protect defendant's sixth amendment right to counsel. It would resolve the conflict that exists with the Wisconsin Rule and United State (sic) Supreme Court decisions.

14. An order by this Court as stated in para. 13 is necessary to prevent petitioner from violating the Supreme Court's ethical rules.

15. Petitioner would note that the no merit procedure for petitions for review is substantially different than that for appeals, and that the Supreme Court does not require an attorney to provide reasons why a petition for review lacks merit. *Compare* 809.32(1) and (4).

16. Petitioner submits that the brief already filed in this action meets all of the requirements set forth by *Anders* and *Lucey*.

17. A determination of the no merit rule, defendant's right to counsel and whether Rule 809.32(1) violates that right is necessary before any new brief is written to prevent petitioner from violating defendant's sixth amendment right to counsel.

WHEREFORE, petitioner respectfully requests that this Court strike that portion of Rule 809.32(1) which requires that the attorney provide reasons why the issue

lacks merit as unconstitutional, and accept the brief that has already been filed in this action.

Dated this 4th da - of June, 1985.

Respectfully submitted,

/s/ LOUIS B. BUTLER, JR.
Assistant State Public Defender

819 North Sixth Street, Room 821
Milwaukee, Wisconsin 53203

/s/ ERIC SCHULENBERG
Chief, Appellate Division

340 West Washington Avenue
P. O. Box 7862
Madison, Wisconsin 53707-7862

Attorneys for Defendant-Appellant.

DISTRICT I

Office of the Clerk
COURT OF APPEALS
OF WISCONSIN

Amended January 16, 1986
Madison, January 15, 1986

(Title omitted in printing)

ORDER

84-929-CR-NM

Before Moser, P.J., Wedemeyer and Sullivan, JJ.

Ellis T. McCoy (McCoy) has renewed his motion for an order determining the constitutionality of Rule 809.32 (1), Stats., and to clarify the scope of his counsel's representation pursuant to Rule 809.14, Stats., and order of the Wisconsin Supreme Court in *State ex rel. McCoy v. Court of Appeals, District I*, No. 85-0781-W. The procedural facts of the case follow.

On August 14, 1984, McCoy moved for determination of the constitutionality of Rule 809.32(1), Stats., before this court. The court denied the motion on September 7, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." Subsequently, McCoy filed a no merit brief which was not in compliance with Rule 809.32(1), Stats. The court, in an order dated April 16, 1985, ordered that the no merit brief previously filed be struck for noncompliance with Rule 809.32(1), Stats. The court of appeals ordered McCoy to file a new brief in compliance with Rule 809.32(1), Stats., within fifteen days of the date of the order.

The defendant then filed a petition for a supervisory writ of prohibition and declaration of his rights in the Wisconsin Supreme Court in *Wisconsin ex rel. McCoy v. Wisconsin Court of Appeals, District I,* No. 85-0781-W. The supreme court denied the petition on May 8, 1985. It ruled that McCoy had an adequate remedy at law by renewing his motion for determination of the constitutionality of Rule 809.32(1), Stats., in the court of appeals. In accordance with that direction from the supreme court, McCoy has filed the present motion again requesting our determination of the constitutionality of Rule 809.32(1), Stats.

The court of appeals has no power to pass upon the questions posed by McCoy. Rule 809.32(1), Stats., is a rule prescribed by the supreme court for the regulation of the practice of the court of appeals. Such a procedural rule is binding upon this court until altered by the supreme court or the legislature. *Mosing v. Hagen,* 33 Wis. 2d 636, 646-47, 148 N.W.2d 93, 99 (1967). Viewing McCoy's motion in this light, we conclude that any determination by this court of the constitutionality of Rule 809.32(1), Stats., would be advisory in nature. Courts of law do not render advisory opinions. *Smith v. Pershing,* 10 Wis. 2d 352, 357, 102 N.W.2d 765, 768 (1960). The constitutionality of sec. 809.32(1), Stats., must be determined by its supreme court authors and not by a court bound to obey what that court creates.

Upon the foregoing reasons,

IT IS ORDERED that McCoy's motion requesting that we determine the constitutionality of Rule 809.32(1), Stats., and to clarify the scope of representation is denied. Louis Butler, assistant public defender, is further directed to file a brief in compliance with Rule 809.32(1) within fifteen days of the date of this order.

Marilyn L. Graves
Clerk of Court of Appeals

BEST AVAILABLE COPY

STATE OF WISCONSIN
IN SUPREME COURT

Case No. ————————

STATE OF WISCONSIN EX REL.
ELLIS T. McCOY,

Relator,

v.

From: Appeal No. 84-929-CR-NM
Trial No. K-3561

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Respondent.

PETITION FOR SUPERVISORY WRIT OF PROHIBITION AND DECLARATION OF RELATOR'S RIGHTS

The petition on behalf of Ellis T. McCoy, by his attorney, Louis B. Butler, Jr., Assistant State Public Defender, pursuant to Rule 809.71, Stats., hereby petitions this court for a supervisory writ of prohibition prohibiting the court of appeals from striking the brief previously filed and prohibiting the court of appeals from ordering counsel to provide reasons why the issues presented in that brief lack merit, in compliance with Rule 809.32(1), and petitions this court, pursuant to Rule 809.70, Stats., to determine the constitutionality of Rule 809.32(1) and whether the rule violates relator's sixth amendment right to counsel, on the following grounds:

1. The petitioner, Louis B. Butler, Jr., represents the relator, in the case of *State of Wisconsin v. Ellis T. McCoy,* Case No. 84-929-CR-NM, now pending in the court of appeals, District I.

2. Relator moved for a determination of the constitutionality of Rule 809.32(1) before the court of appeals in a motion dated August 14, 1984.

3. The court of appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justifiable controversy exists involving the constitutionality issue." See September 7, 1984 order, p. 2 (attached).

4. A "No Merit" brief was filed by this attorney on October 22, 1984, which was in compliance with *Anders v. California,* 386 U.S. 738 (1967) and the subsequent decision of *Evitts v. Lucey,* 469 U.S. —, 83 L.Ed.2d 821, 828 (1985), but not in compliance with Rule 809.32(1).

5. The court of appeals, District I, in an order dated April 16, 1985, ordered that the brief previously filed in this action be struck for noncompliance with Rule 809.32(1) because reasons why the issues lacked merit were not included. The court also ordered that petitioner file a new brief within 15 days of the date of that order which is in compliance with the Rule.

6. The Wisconsin Supreme Court, in an order dated May 8, 1985 ruled that petitioner was not entitled to a supervisory writ and declaratory relief from that court for the reason "that he has an adequate remedy in the

Court of Appeals by renewing his motion for a determination of the constitutionality of sec. (Rule) 809.32(1), Stats." See order in No. 85-0781-W, attached.

7. Petitioner renewed his "Motion to Determine Constitutionality of Rule 809.32(1) and to clarify scope of Attorney's Representation on Appeal" in the Court of Appeals in a motion dated June 4, 1985 (attached).

8. The Court of Appeals denied petioner's (sic) motion in an order dated January 15, 1986 and amended January 16, 1986, stating that the "constitutionality of sec. 809.32(1), Stats., must be determined by its Supreme Court authors and not by a court bound to obey what that court creates." See order, attached.

9. The United States Supreme Court in *Anders, supra,* has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae,* 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the

defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

10. The Wisconsin Supreme Court, consistent with *Anders,* has held that the Wisconsin no merit procedure which was in existence prior to the creation of Rule 809.32(1) did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. *Cleghorn v. State,* 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972). This Court has not as yet had an opportunity to review the current procedure since the creation of Rule 809.32(1).

11. The United States Supreme Court very recently has reaffirmed its prior holding in *Anders,* stating that the attorney ". . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts v. Lucey,* 83 L. Ed. 2d at 828.

12. The United States Court of Appeals recently held that "(i)f the *Anders* procedure is to work, therefore, the lawyer filing the *Anders* brief must, to the extent possible, remain in his role as advocate; at this stage of proceeding it is not for the lawyer to act as an unbiased judge of the merit of particular grounds for appeal. He or she is required to set out *any* irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court,

be arguably meritorious. This is done in order that those potential claims not be overlooked. The objective of these potential claims is for the court's determination, not the advocates." *United States v. Blackwell,* 767 F.2d 1486, 1487-88 (11th Cir. 1985).

13. At least one State Supreme Court has determined that it will no longer accept *Anders* motions, implying that frivolous briefs would be preferable. *Huguley v. State,* 253 Ga. 709, 324 S.E. 2d 729 (1985). *But see* Rule 809.25(3).

14. Rule 809.32(1) requires that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders,* the attorney shall file with the court a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit.

15. Petitioner and relator submit that the portion of sec. 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on relator's sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be directly contrary to the mandates of *Anders* and *Lucey* that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, petitioner and relator submit that a discussion of why any issue lacks merit violates the sixth amendment.

16. Because petitioner believes that the portion of Rule 809.32(1) which requires a discussion of why an issue lacks merit is unconstitutional, petitioner cannot ethically take a position which would argue against his client or act as a friend of the court. This Court's rules require that while serving as an advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. SCR 20.34(1)(c) (1984). This Court has also determined that an advocate may urge any permissible construction of the law favorable to his or her client, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification or reversal of the law. SCR 20.34(2)(c) (1984).

17. An order by this Court prohibiting the court of appeals from striking the brief previously filed and from ordering counsel to provide reasons why the issues lack merit is necessary in order to protect relator's sixth amendment right to counsel. It would resolve the conflict that exists between the Wisconsin Rule and United State (sic) Supreme Court decisions.

18. An order by this Court as stated in para. 17 is necessary to prevent petitioner from violating this Court's ethical rules.

19. Petitioner would note that the No Merit procedure for petitions for review is substantially different than that for appeals, and that this Court does not require an attorney to provide reasons why a petition for review lacks merit. *Compare* 809.32(1) and (4).

20. Petitioner submits that the brief already filed in this action meets all of the requirements set forth by *Anders* and *Lucey.*

21. A declaration of relator's sixth amendment right to counsel and whether Rule 809.32(1) violated that right is necessary before any new brief is written to prevent petitioner from violating relator's sixth amendment right to counsel.

22. Petitioner and relator currently have no other adequate remedy at law, other than this petition, to protect relator's rights and prevent petitioner from violating his ethical duty.

WHEREFORE, petitioner respectfully requests that this Court strike that portion of rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, prohibit the court of appeals from striking the brief already filed, and prohibit the court of appeals from requiring petitioner to provide reasons why relator's appeal lacks merit in compliance with Rule 809.32(1).

Dated this 21st day of January, 1986.

Respectfully submitted,

/s/ Louis B. Butler, Jr.
LOUIS B. BUTLER, JR.
Assistant State Public Defender

819 North Sixth St., Room 821
Milwaukee, Wisconsin 53203

ERIC SCHULENBERG
Chief, Appellate Division

P.O. Box 7923
Madison, Wisconsin 53707

cc: Ellis T. McCoy
Box 147
Fox Lake, WI 53933

James McDermitt
Assistant Attorney General

Hon. Ted E. Wedemeyer
Court of Appeals, District I

Hon. William R. Moser
Court of Appeals, District I

Hon. Michael T. Sullivan
Court of Appeals, District I

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 86-0172-W

(Title omitted in printing)

RESPONSE TO PETITION FOR SUPERVISORY WRIT OF PROHIBITION AND DECLARATION OF RELATOR'S RIGHTS; AND SUPPORTING MEMORANDUM

BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

JAMES H. McDERMOTT
Assistant Attorney General

Attorneys for Respondent

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859

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Preface

This response to the above-described petition of the relator (hereinafter "the Petition"), and its supporting memorandum, are filed pursuant to an order of this Court, entered herein on February 21, 1986.

Such order has viewed the Petition, insofar as it seeks a declaratory judgment described in such order, as constituting "a request for leave to commence an original action, pursuant to sec. (Rule) 809.70, Stats."; and therefore the response hereinafter set forth, and its supporting memorandum, appropriately first address whether this Court should grant the Petition, insofar as it constitutes a request for leave to commence an original action in this Court, pursuant to sec. (Rule) 809.70, Stats.

RESPONSE

NOW COMES the respondent above-named, by Bronson C. La Follette, Attorney General, State of Wisconsin, and James H. McDermott, Assistant Attorney General, its attorneys, and, as a response to the Petition herein, respectfully submits to this Court as follows:

(1) That insofar as the Petition herein constitutes, in the view of this Court, a request for leave to commence an original action, pursuant to sec. (Rule) 809.70, Stats., it should be granted, for the reasons shown in Arguments I, II and III, presented in the Supporting Memorandum, *infra,* which arguments are incorporated herein by reference.

(2) That the Petition, insofar as it seeks, in the language of this Court: "a declaratory judgment that sec. (Rule) 809.32(1), Stats., to the extent that it requires an

attorney appointed to represent a criminal defendant in an appeal to discuss in a no merit brief why the issues that might arguably support the appeal lack merit, is unconstitutional" should be denied, for reasons set forth in Arguments IV and V of said Supporting Memorandum, which arguments are incorporated herein by reference.

(3) That the Petition, insofar as it seeks, in the language of this Court, "a supervisory writ to prohibit the Court of Appeals from striking the no merit brief previously filed in the appeal and ordering counsel for the defendant to provide reasons why the issues presented in the brief lacked merit" should be denied, for reasons shown in Argument VI of said Supporting Memorandum, which argument is incorporated herein by reference.

SUPPORTING MEMORANDUM

I. THE PETITION, INSOFAR AS IT CONSTITUTES A REQUEST FOR LEAVE TO COMMENCE AN ORIGINAL ACTION PURSUANT TO SEC. (RULE) 809.70, STATS., SHOULD BE GRANTED, BECAUSE NO LOWER COURT OF THIS STATE, TRIAL OR APPELLATE, HAS POWER TO GRANT THE QUINTESSENTIAL AND BASIC RELIEF SOUGHT HEREIN, IN A MATTER *PUBLICI JURIS,* NAMELY, THE PASSING OF ADVERSE JUDGMENT ON THE CONSTITUTIONALITY OF A RULE OF THIS COURT, SUCH AS THAT HERE INVOLVED.

In the *Income Tax Cases,* 148 Wis. 456, 498, 134 N.W. 673, 135 N.W. 164 (1912), the Court said in pertinent part:

> . . . the original jurisdiction of this court may be rightly invoked when there is a showing made . . . that . . . (8) the situation is such, in a matter *publici juris,*

> that the remedy in the lower courts is entirely lacking . . . , and hence jurisdiction must be taken or justice will be denied . . . . Cases falling within these general classes have been hld to be properly within the original jurisdiction.

There can be no doubt, respondent submits, that the matter here involved is "*publici juris.*" In *State ex rel. Reynolds v. Appleton,* 197 Wis. 442, 444, 222 N.W. 244 (1928), this Court observed that " . . . To challenge an order of the railroad commission, lawfully made, is to challenge the authority of the state itself, and it therefore becomes a matter of state-wide concern and *publici juris.*" Here, the challenge is to a rule of this Court, lawfully made; and it also is obviously a challenge to the authority of the state itself, which "therefore becomes a matter of state-wide concern and *publici juris.*" It follows, this matter clearing being one "*publici juris,*" that under the above-quoted portion of the *Income Tax Cases,* this Court must take jurisdiction herein, or justice will be denied because the declaratory judgment remedy sought by relator herein, which must be granted to him, if warranted, before the writ of prohibition it seeks could issue, is plainly "entirely lacking" in "the lower courts", *i.e.,* in any state lower court, trial or appellate.

The declaratory judgment remedy which relator seeks herein clearly entails a passing of judgment on the constitutionality of a portion of a rule of this Court, namely, sec. (Rule) 809.32(1), Stats., a declaration that such portion is unconstitutional, and a striking of such portion by the court so declaring. *See* Petition, pp. 1, 2, unnumbered first paragraph; Par. 17, Petition, p. 7; and what might be

termed the "prayer" of the Petition, at p. 8, wherein the relator, described as "petitioner" requests, *inter alia,* "that this Court strike that portion of rule 809.32(1) which requires that the attorney provide reasons why the issue lacks merit as unconstitutional, ..."

The State respectfully submits that, on the basis of authorities discussed *infra,* no lower court of the State of Wisconsin, trial or appellate, possesses the power to strike a rule of pleading, practice, or procedure promulgated by its supervising court, the Supreme Court of Wisconsin, or any portion of such a rule. And the State further submits that, on the same basis, it is beyond the power of any such lower court to make a "determination" that such a rule, or any portion thereof, violates the Sixth Amendment right to effective representation of counsel, and to then and therefore order it stricken. As will now be shown, if there is to be any voiding or striking of the portion of Rule 809.32(1)[1] here in question, namely, the words "and a discussion of why the issue lacks merit," appearing in its first sentence, it must occur either through action of the Supreme Court of Wisconsin, or of its Legislature, and

---

1 Such rule, as of July, 1985, reads:

> "If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders v. California,* 386 U.S. 783 (1967), the attorney shall file *with the Court of Appeals,* 3 copies of a brief in which is stated *anything in the record that might arguably support the appeal and a discussion why the issue lacks merit.* The attorney shall serve a copy of the brief on the defendant, and shall file a copy in the Court of Appeals that service has been made upon the defendant. The defendant may file a response to the brief within 30 days of service." (Emphasis supplied.)

cannot come about as a result of a lower state court passing adverse constitutional judgment on such rule portion.

That this is so is established by explicit declarations of this Court, grounded on statutory provisions relative to its rule-making powers.

The first of such declarations is found in *Attorney General ex rel. Cushing v. Lum* [hereinafter "Lum"], 2 Wis. 371 (*507), 374 (*510) (1853), in the statement therein that, " . . . The rules prescribed by this court for the regulation of its own practice, *as well as for that of the Circuit Court,* are the law of the land, and are binding upon *all courts,* officers and parties, *until altered by this court or the legislature.* R. S., p. 409 . . . . " (Emphasis supplied.) And this statement was simply a recognition of what statutory law provided, as evidenced by sec. 1 of Title XXII of the Revised Statutes of Wisconsin, 1849, appearing at p. 409 thereof, and reading:

> The several judges of the supreme court shall, and they are hereby required, to meet at the supreme court room, in Madison, on the second Tuesday of June, A.D. one thousand eight hundred and forty-nine, and hold a term of the supreme court *for the purpose of preparing and promulgating a code of rules of practice for the different courts of the state,* and also to dispose of any other business that may be on the calendar for their disposition, as at any other term; and all rules adopted and published by the supreme court, shall be taken and construed to have the same binding force and effect that is given to a law, *until the said rule shall be amended or altered by the supreme court or the legislature.* (Emphasis supplied.)

A modern case, *Mosing v. Hagen* [hereinafter "*Mosing*"], 33 Wis. 2d 636, 646, 647, 148 N.W.2d 93 (1967),

shows that the law, as set forth in *Lum* and the 1849 statute therein mentioned, remains unchanged, despite differences between such 1849 statute and its successor statute in force in 1967, and still in force, albeit renumbered. *Mosing* so shows in its statement that, " . . . almost since statehood the court has recognized that its rules regulating practice before it and before the circuit courts are the law of the land and are binding upon *all courts,* officers and parties *until changed by the court or the legislature. Attorney General ex rel. Cushing v. Lum* (1853), 2 Wis. 371 (*507)." (Emphasis supplied.) The pertinent statute in effect in 1967 when this statement was made was sec. 251.18, Stats., 1963, quoted in full in *Mosing* (33 Wis. 2d at 644), and reading in pertinent part as follows:

> The state supreme court *shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts,* for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits . . . . *Nothing in this section shall abridge the right of the legislature to enact, modify or repeal statutes or rules relating to pleading, practice or procedure* . . . . (Emphasis supplied.)

It will be noted that while the 1849 statute above-quoted specifically provided that "all rules adopted and published by the supreme court, shall be taken and construed to have the same binding force and effect that is given to a law, *until the said rule shall be amended or altered by the supreme court or the legislature.*" (Emphasis supplied), such language does not appear in sec. 251.18, Stats. (1963). It is clear that the sec. 251.18, Stats., provision that, "nothing in this section shall abridge the right of the legislature to enact, modify or repeal statutes or

rules relating to pleading, practice or procedure'' clearly established that the rules of the Supreme Court could be modified or repealed by the Legislature. There is, however, no language in sec. 251.18, Stats., as there was in its 1849 predecessor, expressly showing that one of the two exclusive means for modifying or repealing such rule was by action of the Supreme Court itself. Despite this difference in the statutes, however, the Supreme Court of 1967, well aware of the provisions of sec. 251.18, which is quoted in full in its *Mosing* opinion, and doubtless well aware, too, of *Lum's* reliance on the 1849 predecessor statute of sec. 251.18, showed no hesitancy or reluctance in referring with obvious approval to the long-standing recognition of the *Lum*-stated principle above-shown, with obvious approval of such principle as well, as a rule of law firmly imbedded in Wisconsin jurisprudence. It is submitted that this Court showed no hesitancy or reluctance in conferring such approvals in *Mosing* because it must have viewed the first sentence of sec. 251.18, Stats., with its provision for mandatory procedural rulemaking by the Supreme Court to ''regulate pleading, practice and procedure in judicial proceedings in all courts,'' when read in conjunction with the further provision of such statute that nothing therein ''shall abridge the right of the legislature to enact, modify or repeal . . . rules relating to pleading, practice or procedure,'' as clearly indicating that the province of procedural rule-making was one wherein no body or entity, such as, *e.g.*, a lower court, could intrude, such province being exclusively that of the Supreme Court or the Legislature. And since no decision of the Supreme Court of Wisconsin subsequent to *Mosing* has departed from the principle enunciated in *Lum*, as above shown, and approved in and by *Mosing*, as above shown, it is plain, the State submits,

that today, as in 1853 and and as in 1967, a procedural rule such as Rule 809.32, or any part thereof, cannot be ''changed,'' *i.e.*, stricken, voided, suspended, amended, or in any way modified, unless by action of the Supreme Court of Wisconsin, pursuant to the procedural requirements laid down in sec. 751.06, Stats., the current successor statute to sec. 251.18, Stats., 1963, or by action of the Legislature.

The case law and statutes of Wisconsin above-noted, insofar as they clearly show that rules of pleading, practice, or procedure (hereinafter ''procedural rules'') promulgated by the highest court of the state are not to be changed by a lower court, including a lower appellate court, are in accord with a general principle of law widely recognized in the United States. Such principle, and the uniform adherence accorded it in this country, were given joint and early recognition in *State v. Knight*, 152 P. 362, 363, 49 Okla. 202 (Sup. Ct. of Okla. 1915), when the Court said:

> . . . the effect of the [procedural] rules when adopted by an appellate court, that are prescribed to govern procedure in inferior courts, has frequently been passed upon by the courts, and invariably held to be binding, and the question does not seem to us to admit of any controversy or argument.
>
> The rule is stated thus in 6 Stand. Ency. Proc. p. 63:
>
> 'Rules have the force and effect of law, and are binding upon litigants, and upon counsel, upon the court and its officers. A rule made pursuant to statutory authority by an appellate court to govern the procedure in inferior courts is binding upon the latter, and rules adopted by a board or convention of judges are binding on the individual judges.'

And in the notes to this text are cited a great number of cases from many states in the Union. In fact we do not know of any case where an appellate court is given authority by statute to prescribe rules regulating procedure in inferior courts which holds that such rules are not binding, *or that the inferior court may disregard or set aside said rules.* The same rule is announced in 18 Ency. P. & P. p. 1271, as follows:

'Although courts may sometimes dispense with the requirements of their own rules, *it is uniformly held that they have no such power in regard to rules prescribed for them by a higher court.*'

We might cite case after case in support of this proposition, but deem it unnecessary. *It was clearly without the power and authority of the defendant, as the judge of the county court of Rogers county, to vacate or set aside the rules theretofore prescribed by the justices of this [supreme] court, and adopted by his predecessor,* . . . (Emphasis and bracketed material supplied.)

More recent cases have also followed the principle that procedural rules of a state's highest court are not to be amended, altered, or changed by any lower court. *See, e.g., In re Estate of Moore,* 291 N.E.2d 566, 568 (Ct. App. Indiana, 1973); *Ser-Nestler, Inc. v. General Finance Loan Company,* 167 So. 2d 230, 232 (Dist. Ct. of App. of Fla. 1964); *Pruitt v. Wood,* 156 S.E. 126, 127, 99 N.C. 788 (1930); *State v. Moore,* 187 S.E. 586, 587, 210 N.C. 459 (1936); and *State v. McCall,* Fla., 301 So. 2d 774, 775 (1974).

Clearly, then, the Wisconsin rule in question, which denies any lower state court the power to strike the portion of Rule 809.32(1) herein constitutionally challenged, and denies it the power to make the "determination" of

claimed constitutional invalidity of such rule sought by relator, finds impressive support in the decisions of other state courts. Moreover, it is clear that a counterpart of such rule is operative in the Federal judicial system. *See Sutton v. United States,* 267 F.2d 271, 273 (4th Cir. 1959), wherein the Court held that where a rule "was adopted by the Supreme Court [of the United States] in the exercise of its supervisory power over the federal judicial system, it is not within the province of an inferior court, even if it deemed it desirable, to extend the rule's operation beyond the areas in which it has been applied by the Supreme Court. [Authority omitted.]" (Bracketed material supplied.) This holding, it is submitted, is clear evidence that in the Federal judicial system, as in that of Wisconsin, a rule of the system's highest court cannot be changed by any lower court in such system.

It is also perhaps noteworthy that, consistent with the sound principle that a lower state court cannot change a *procedural* rule enunciated by the state's highest court, at least one appellate court has held that an appellate court cannot change a rule of adjudication announced by the state's highest court. *See Girvin v. Metropolitan Life Ins. Co.,* 84 S.W.2d 644, 645 (Springfield Court of Appeals, Missouri, 1935).

In making this particular argument, the respondent is well aware that it may seem anomalous that the Wisconsin Court of Appeals, and even a circuit court in Wisconsin, can pass judgment on the constitutionality of a

statute,[2] but is precluded from doing so with respect to a procedural rule of the Supreme Court. If such anomaly exists, however, it is plainly not something which, in and of itself, could be said to overturn, or capable of being used as the basis for overturning, the well-entrenched principle of Wisconsin law that a lower court cannot and shall not change, by striking, voiding, suspending, amending, or in any way modifying, a procedural rule of the State's highest court. And it is such rule, the respondent submits, which, in this matter *publici juris,* decrees that "the remedy in the lower courts is entirely lacking", so that this Court must take original jurisdiction herein, "or justice will be denied."

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[2] As to the Circuit Court's power to rule on the constitutionality of a statute, see *Just v. Marinette County,* 56 Wis. 2d 7, 24-26, 201 N.W.2d 761 (1972). There is language in this case so broad that, *considered alone,* it might be thought of as authorizing a circut court to rule on *any* "constitutional issue," even one as to the constitutionality of a procedural rule of the Wisconsin Supreme Court, or some part thereof. Such language is, "We think that when a *constitutional issue* is now presented to the trial courts of this state, it is the better practice for those courts to recognize its importance, have the issue thoroughly briefed, and fully presented. *The issue* should be decided as any other important issue with due considerations. . . ." (Emphasis supplied; 56 Wis. 2d at 26.) Read, however, in the context of the *Just v. Marinette County* decision, and perhaps especially in the context of the paragraph wherein such broad language appears, and in the context of the two preceding paragraphs, it is plain, the State submits, that such broad language was not meant to, and does not, authorize a circuit court or any other lower court in the Wisconsin judicial system to adjudicate a constitutional challenge to a Supreme Court procedural rule.

II. THE PETITION, INSOFAR AS IT CONSTITUTES A REQUEST FOR LEAVE TO COMMENCE AN ORIGINAL ACTION, PURSUANT TO SEC. (RULE) 809.70, STATS., SHOULD BE GRANTED EVEN WERE THIS NOT A MATTER *PUBLICI JURIS,* BECAUSE NO LOWER COURT OF THIS STATE, AS ABOVE SHOWN, HAS POWER TO GRANT THE QUINTESSENTIAL AND BASIC RELIEF SOUGHT BY RELATOR HEREIN, WERE HE ENTITLED TO IT; AND FOR THIS COURT TO REFUSE TO INVOKE ITS ORIGINAL JURISDICTION HEREIN WOULD THEREFORE DENY RELATOR ACCESS TO ANY REMEDY FOR HIS ALLEGED WRONG, IN VIOLATION OF ART. I, SEC. 9, WISCONSIN CONSTITUTION.

As above shown, this is clearly a matter *publici juris;* but assuming, for purposes of this argument only, that it is not, the above-stated argument, requiring nothing by way of amplification, can be and hereby is made. In making such argument, however, involving the constitutional guaranty of Art. I, sec. 9, Wisconsin Constitution, that "Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character . . .", respondent, lest such argument be misunderstood by relator as a concession by respondent that relator is entitled to victory on the merits herein, points out the following sapient observations made by the Court in *New York Life Ins. Co. v. State,* 192 Wis. 404, 412, 211 N.W. 288, 212 N.W. 801 (1927):

> . . . The guaranty of sec. 9, art. I, of the state constitution that "Every person is entitled to a certain remedy in the laws" does not mean a remedy that must be accompanied by a certainty of recovery. If it did, the losing party of every lawsuit would be denied rights guaranteed to him by this section of the constitution. *This provision does no more than to*

guarantee to every suitor his day in a court of competent jurisdiction to which he may present his claim for judicial relief and in which he may either win a victory or suffer a defeat according to the strength or weakness of the case which he presents. (Emphasis supplied.)

III. THE PETITION, INSOFAR AS IT CONSTITUTES A REQUEST FOR LEAVE TO COMMENCE AN ORIGINAL ACTION, PURSUANT TO SEC. (RULE) 809.70, STATS., SHOULD BE GRANTED, IF ONLY FOR THE REASON THAT IT PRESENTS A UNIQUE ISSUE OF INTEREST TO THIS STATE AND ITS CITIZENS, WHICH MERITS IMMEDIATE CONSIDERATION BY THIS COURT.

The above-stated argument requires little amplification except to note that it derives substantial support from the statement made in *State ex rel. Lynch v. Conta,* 71 Wis. 2d 662, 668, 239 N.W.2d 313 (1976), that, "This court has already decided the question of original jurisdiction. Unquestionably the guidelines acknowledged in *Petition of Heil* (1939), 230 Wis. 428, 442, 443, 284 N.W. 42, embrace this case, *with its unique issues of interest to this state and its citizens.*" (Emphasis supplied.) There can be no doubt of the uniqueness of the issue here presented, if only by reason of the fact that it appears to be the first constitutional challenge to sec. (Rule) 809.32(1), Stats., and the first challenge to the constitutionality of a procedural rule of this Court on a Sixth Amendment basis, and perhaps on any basis. It is certainly beyond dispute that such issue is of interest to the State of Wisconsin, since, under case law above-cited, it clearly involves a challenge to the authority of the state itself. Moreover, such issue is plainly of interest to the citizens of this

state, since it involves a claim of an alleged Sixth Amendment right of any citizen-defendant of this state whose attorney, appointed under sec. (Rule) 809.30, Stats., or under ch. 977, Stats., is, in the language of sec. (Rule) 809.32(1), Stats., "of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of *Anders v. California,* 386 U.S. 738 (1967), ..." While citizens falling into this category would clearly constitute only a small portion of Wisconsin's citizenry at any given time, the interest of every Wisconsin citizen is involved in such constitutional claim, since it is theoretically possible that *any* citizen of Wisconsin might someday find himself or herself in such category.

IV. THE PETITION, INSOFAR AS IT SEEKS, IN THE LANGUAGE OF THIS COURT, "A DECLARATORY JUDGMENT THAT SEC. (RULE) 809.32(1), STATS., TO THE EXTENT THAT IT REQUIRES AN ATTORNEY APPOINTED TO REPRESENT A CRIMINAL DEFENDANT IN AN APPEAL TO DISCUSS IN A NO MERIT BRIEF WHY THE ISSUES THAT MIGHT ARGUABLY SUPPORT THE APPEAL LACK MERIT, IS UNCONSTITUTIONAL," SHOULD BE DENIED, BECAUSE THE PORTION OF SEC. (RULE) 809.32(1), STATS., CHALLENGED AS DENYING RELATOR'S SIXTH AMENDMENT RIGHT TO EFFECTIVE REPRESENTATION OF COUNSEL DOES NOT DENY SUCH RIGHT, AND INDEED PROTECTS AND PROMOTES IT, FOR REASONS DISCUSSED BELOW.

Respondent submits that the portion of Rule 809.32(1) challenged herein not only does *not* deny defendant his

Sixth Amendment right to effective representation of counsel, but indeed protects and promotes such right.

In taking such position in this argument, respondent will first address relator's erroneous claim that Federal case law shows the rule portion in question to be an infringement on relator's "sixth amendment right to counsel," (Par. 15, Petition); will then discuss how and why such rule portion is in actuality protective and promotive of a defendant's right under the Sixth Amendment, United States Constitution, to effective representation of counsel; and will then discuss certain state court decisions supportive of the above-described position of respondent, and the sole Federal case, its rationale notably weak, which arguably is *contra* such position.

A.

The "attorney appointed under s. 809.30 or ch. 977," referred to in Rule 809.32(1), will hereinafter be called, for purposes of brevity, "defender."

The question addressed in this argument is this: Where a defender, pursuant to Rule 809.32(1), files with the Court of Appeals a "no merit" brief showing "anything in the record that might arguably support the appeal," does the requirement of s[illegible]ule that such brief contain "a discussion of why the issue lacks merit" compel action of the defender which constitutes a denial of defendant's Sixth Amendment right to effective assistance of counsel? Relator asserts the claim that Federal case law answers such question, "Yes." The respondent disagrees, for reasons now shown.

In asserting the above-mentioned claim, the Petition reads in pertinent part:

> 9. The United States Supreme Court in *Anders, supra,* has ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae,* 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:
>
> 'This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.'
>
> . . .
>
> 11. The United States Supreme Court very recently has reaffirmed its prior holding in *Anders,* stating that the attorney ". . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Evitts v. Lucey,* 83 L. Ed.2d at 828.
>
> 12. The United States Court of Appeals recently held that "(i)f the *Anders* procedure is to work, there-

fore, the lawyer filing the *Anders* brief must, to the extent possible, remain in his role as advocate; at this stage of proceeding it is not for the lawyer to act as an unbiased judge of the merit of particular grounds for appeal. He or she is required to set out *any* irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious. This is done in order that those potential claims not be overlooked. The objective of these potential claims is for the court's determination, no' he advocates." *United States v. Blackwell,* 767 F. 1486, 1487-88 (11th Cir. 1985).

. . .

15. Petitioner and relator submit that the portion of sec. 809.32(1) which requires a discussion of any the appeal lacks merit would infringe on his sixth amendment right to counsel. Counsel would no longer be an advocate, as required by the United States Supreme Court, but would be in the awkward position of arguing why his client's appeal lacks merit. This would be directly contrary to the mandates of *Anders* and *Lucey* that the attorney not brief the case against the client and that the attorney act as an advocate. Since an attorney is legally bound to represent the best interests of his or her client until relieved from further representation by this court, defendant submits that a discussion of why any issue lacks merit violates the sixth amendment.

Before considering the language of *Anders v. California,* 386 U.S. 738 (1967) (hereinafter "*Anders*"), *Evitts v. Lucey,* 83 L. Ed. 2d 821, 469 U.S. — (1985) (hereinafter "*Evitts*"), and *United States v. Blackwell,* 767 F.2d 1486 (1985) (hereinafter "*Blackwell*"), giving rise to most of the above-quoted portions of the Petition, respondent di-

rects this Court's attention to what might be called the seminal case on the subject of withdrawal by a defender after trial, on the ground that appeal would be frivolous. Such case is *Ellis v. United States,* 356 U.S. 674 (1958) (hereinafter "*Ellis*"), and its key language is quoted in *Anders,* 386 U.S. at 741, 742. It reads:

> If counsel is convinced, after conscientious investigation, that the appeal is frivolous, of course, he may ask to withdraw on that account. *If the court is satisfied that counsel has diligently investigated the possible grounds of appeal, and agrees with counsel's evaluation of the case,* then leave to withdraw may be allowed and leave to appeal may be denied. (Emphasis supplied).

This case law language, advisory in nature, raises some substantial questions of its own. How can a court, passing on a "no merit" brief, become "satisfied that counsel has diligently investigated the possible grounds of appeal?" Is such satisfaction attained by a defender doing nothing more than giving a bare-bones list of possible grounds for appeal, without analysis of such grounds to show their lack of merit? Should not the defender, for the benefit of the defendant as well as for the benefit of this court, not only list the possible grounds for appeal, if any, but then carefully spell out just why such grounds lack merit? *Ellis,* it is submitted, does not answer these questions, though it raises them. Nor are they answered, it is submitted, by *Anders, Evitts,* or *Blackwell.*

Turning now to *Anders,* respondent submits that only a misreading thereof will produce the conclusion arrived at by the relator that it condemns, as a denial of his constitutional right to effective representation of counsel, the rule

requirement here in question, namely, that the "no merit" brief show the meritless nature of any issue which might arguably support the appeal.

The key portions of *Anders,* it is submitted, are these:

> In petitioner's case, his appointed counsel wrote the District Court of Appeal, stating:
>
> 'I will not file a brief on appeal as I am of the opinion that there is not merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him. . . . [H]e wishes to file a brief in this matter on his behalf.'
>
> The District Court of Appeal, after having examined the record, affirmed the conviction. *We believe the counsel's bare conclusion, as evidenced by his letter, was not enough. . . .*
>
> . . .
>
> The constitutional requirement of substantial equality and fair process can only be attained *where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae.* The no-merit letter and the procedure it triggers do not reach that dignity. *Counsel should, and can with honor and without conflict, be of more assistance to his client and the court.*[3] His role as advocate requires that he support his client's *appeal* to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, *after a consciententious* (sic) *examination of it,* he should so advise the court and request permission to withdraw. *That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal.* A copy of counsel's brief should be furnished to indigent and time allowed him to raise any points that he chooses; court —not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (*and therefore not frivolous*) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.

> This requirement *would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.* It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, *but also to the legal authorities as furnished it by counsel.* The no-merit letter, on the other hand, affords neither the client nor the court *any* aid. The former must shift entirely for himself while the court has only the cold record which it must review *without the help of an advocate.* Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. This procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—as are enjoyed by those persons who are in a similar situation but are able to afford the retention of private counsel. (Footnote omitted; emphasis supplied; 386 U.S. 742; 744, 745.)

It is clear that relator herein views parts of this language as, in effect, ruling that a no-merit brief shall not, if it refers to "anything in the record that might arguably support the appeal," take the further step of stating, *consistent with the defender's advice to the court in such brief that he has found defendant's case, in Anders language, to be "wholly frivolous,"* of advising the court *why the* "anything in the record that might arguably support the appeal" was meritless.

The respondent, responding to such view of the relator, first of all submits that nothing in the key langauge above-quoted from *Anders* can be viewed as a holding, express or implied, that condemns as unconstitutionally depriving a defendant of effective assistance of counsel the supplying, in a no-merit brief, of a reasoned explanation by the defender, consistent with his belief that an appeal would be frivolous, of why any matter of record that might arguably support the appeal is meritless. In this respect, it is of particular significance that Footnote 3 to the above-quoted *Anders* language, omitted above, states:

> For comparative purposes see *Tate v. United States,* 123 U.S. App. D.C. 261, 359 F.2d 245, and *Johnson v. United States,* 124 U.S. App. D.C. 29, 360 F.2d 844, which outline the practice followed in the District of Columbia. These guidelines are elaborated in more detaail in a 'Statement to be Handed by the Clerk to Appointed Counsel' which has been prepared by the Court of Appeals for the District of Columbia Circuit. *We indicate no approval of the requirements set out in the statement or in the cases.* (Emphasis supplied.)

Johnson v. United States, referred to in such footnote, shows that the District of Columbia "guidelines" referred to therein provide that a defender, desiring to withdraw because an appeal would be frivolous, was required to " . . . file a supporting memorandum *analyzing the case legally,* citing record references to the transcript of one is available[2] *and also citing any case or cases upon which counsel relied in arriving at his ultimate conclusion*" (emphasis supplied; 360 F.2d at 844-45; footnote omitted). The requirement for a suppporting memorandum "analyzing the case legally," standing alone or considered in conjunction

with the requirement for "citing any case or cases upon which counsel relied in arriving at his ultimate conclusion," obviously could have, and logically should have, produced an analysis of any of those things in the record "which might arguably support the appeal" as being *meritless,* consistent with the defender's opinion that an appeal would be frivolous. And while the Supreme Court in *Anders* stated that, "We indicate no approval of the requirements set out *in the statement* or in the cases" (emphasis supplied), it significantly did not indicate *disapproval* of such requirements, or any one of them. Surely, had the Supreme Court deemed the requirement for a defender to "file a supporting memorandum analyzing the case legally," which requirement would naturally and logically entail the defender's analysis of arguable points on appeal as meritless, as one denying so vital and valuable a constitutional right as that of effective assistance of counsel, it would have unequivocally indicated its *disapproval* of such requirement. It did not do so; and the necessary inference is that it did not do so because it saw no constitutional fault in such requirement, or in compliance therewith.

It is also clear from the key language in *Anders* above-quoted and from the Petition (*see* pars. 9, 15) that the relator herein views *Anders,* in its undoubted requirement that a defender provide some advocacy[3] for his client, even

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[3] *Anders,* as is noted in Par. 9 of the Petition, states that the defender's role of advocate "requires that he support his (or her) client's *appeal* to the best of his ability" (emphasis supplied), *i.e., that if an appeal is taken,* the defender must then pursue it with all the vigor intelligence, and professional skill at his command. If the defender, however, seeks withdrawal on the ground an appeal would be frivolous, his advocacy for his client, though also obviously requiring "the best of his ability," is readily discerned as a different and more restricted one.

while seeking to withdraw on the ground that an appeal would be frivolous, as a requirement so inconsistent with the requirement of Rule 809.32(1) herein challenged as to make the latter requirement unconstitutional. This view, it is submitted, is also unsound. *Anders* does recognize that a defender seeking withdrawal for the above-mentioned reason is under obligation to submit a brief "referring to anything in the record that might arguably support the appeal"; and it is clear that *Anders*, while recognizing the meeting of such obligation as rendering a service to the court itself, also recognizes it as affording the defendant "that advocacy which a nonindigent defendant is able to obtain."[4] But nowhere does *Anders* state a holding that the rendering of such limited advocacy by a defender is constitutionally at odds with the defender taking the further step, completely unmentioned in *Anders*, of setting forth in the no merit brief, consistent with his/her belief that an appeal would be frivolous, the meritless character of the matters, if any, which might arguably support an appeal.

It is true, of course, that the Court in *Anders* stated that "This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain." 386 U.S. at 745. In the context of such sentence, "This requirement" would appear to mean the

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[4] What a nonindigent defendant in Wisconsin receives under the Code of Professional Responsibility by way of services from his retained counsel in a situation where the latter contemplates withdrawal because an appeal from a criminal conviction would, in his judgment, be frivolous, is discussed in argument made below.

suggested procedure for a defendant to follow, relative to seeking withdrawal on the ground an appeal would be "wholly frivolous," outlined by the *Anders* court in the preceding paragraph. It is difficult, however, if not impossible, to discern just what the Court meant with its reference to "appointed counsel" not being forced, presumably under such procedure, "to brief his case against his client." The Court may conceivably have meant that such briefing was not required of the "appointed counsel" because under such procedure he was not required to quarrel with "any points" that defendant, under such procedure, could raise in his response to the no-merit brief. Assuming, however, that the Court viewed "appointed counsel" as not required to "brief his case against his client" because such procedure did not require him/her to argue in the no-merit brief that anything such counsel detected in the record as arguable supporting the appeal was meritless: so assuming, it does not then follow, the respondent submits, that the *Anders* court was thereby holding that a procedure requiring such action of a defender would be requiring him/her to engage in conduct denying his/her client effective assistance of counsel. And it is particularly dubious that the *Anders* court was so holding, in view of its failure, noted above, to condemn as unconstitutional a District of Columbia procedure which can reasonably be read, as above shown, as requiring a defender, albeit by more general language, to do that so specifically required by the language of Rule 809.32(1) herein challenged.

The respondent also submits, of which more below, that it is neither proper nor accurate to characterize a defender's discharge of his duty under the challenged por-

tion of Rule 809.32(1) as constituting a defender's "briefing his case against his client." Instead, the respondent submits, it constitutes, for reasons discussed *infra:* a) the giving of *full* advice to a defender's client as to why the defender believes an appeal would be frivolous; b) the giving of *full* advice to the court on that same subject; and c) the presentation of a logical complement in the no-merit brief to the defender's claim therein that to take an appeal would be frivolous, in the absence of which complement the defender occupies the illogical, indefensible, and paradoxical position, puzzling to and troublesome for his client, of or advising the court and his/her client that an appeal would be frivolous, while simultaneously advising the court and client of matters in the record, if any, which might arguably support the appeal. The obvious conflict in such advice, the respondent submits, can only be resolved by meeting the rule requirement under attack herein.

B.

The respondent submits that rather than producing such denial of a vital constitutional right, the challenged portion of Rule 809.32(1) protects and promotes such right by demanding of a defender an act which, when performed, will give his client a service a nonindigent client should and will presumably have from his retained counsel, acting in accord with the Rules of Professional Responsibility which obtain as to all lawyers practicing in Wisconsin.

This court has adopted what it terms "the modern standard for judging effective assistance of counsel" (*State v. Felton,* 110 Wis. 2d 485, 500, 329 N.W.2d 161 (1983)), such standard being this:

> Effective representation is not to be equated, as some accused believe, with a not-guilty verdict. But the representation *must be equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services.* (Emphasis supplied; *State v. Harper,* 57 Wis. 2d 543, 557, 205 N.W.2d 1 (1973).)

S.C.R. 20.06(8) (f), as part of the Code of Professional Responsibility above-mentioned, provides in pertinent part that,

> Trial counsel for a convicted defendant should continue to represent his or her client *by advising whether to take an appeal* and if the appeal is prosecuted by representing him or her through the appeal unless new counsel is substituted or withdrawal is permitted by the appropriate court. (Emphasis supplied.)

Respondent submits that it is plain that "the ordinarily prudent lawyer, skilled and versed in criminal law," in the course of his/her representation of a client who had privately retained his/her services, and who had been convicted, would undoubtedly follow the ethical consideration of advising such client whether to take an appeal, and in so doing, if his/her advice to such client were that an appeal would be frivolous, would undoubtedly further advise him/her, fully and precisely, as to why it was frivolous, with the latter advice informing such client of any matter that might arguably support the appeal, *accompanied by advice as to just why such matter lacked merit.* It is, the respondent submits, unthinkable that such "ordinarily prudent lawyer, skilled and versed in the criminal law" would give such client anything less by way of such advice on "whether to take an appeal," and especially

unthinkable that he/she would withhold from such client the information as to why his/her lawyer believed meritless any matter in the record which might arguably support such appeal. This would be true because the client, given the first two elements of such advice, but not the third, would reasonably and predictably find such elements conflicting, and quandary-creating, and would require the third element thereof for a clear understanding of why the appeal would be frivolous.

The above-described advice then, clearly constituting representation which "the ordinarily prudent lawyer, skilled and versed in criminal law," would give a client "who had privately retained his services," and who had been convicted, it ineluctably follows that a defender, giving such advice to the court *and to his client* under Rule 809.32(1), including the advice required under the challenged portion thereof, is, under the "modern standard for judging effective assistance of counsel" which has been adopted in Wisconsin, rendering *effective* assistance to his client. And here it should be observed that were the giving of such advice not required by such rule (as would be the case were the challenged portion thereof stricken), one could, it is submitted, confidently predict that many, if not most, of the attorneys to whom sec. (Rule) 809.32(1), Stats., applies would meet what would then be its *sole* requirement of filing with the court, and serving on their clients, "a brief in which is stated anything in the record which might arguably support the appeal," but would not go further and then provide their clients with a reasoned, helpful, and quandry-dispelling explanation as to why the things in the record "which might arguably support the appeal" were devoid of merit.

The providing of such explanation might in many instances, if not most, involve considerable and difficult legal labor, consuming much time and effort; and it may well be reasonably doubted that such explanation would often be provided a defendant, whose attorney had been appointed under sec. (Rule) 809.30, Stats., or under ch. 977, Stats., were it not required, as now, by sec. (Rule) 809.32(1), Stats.

There are other aspects of the Code of Professional Responsibility which also indicate that the defender, complying with the challenged portion of Rule 809.32(1) by discussing "why the issue lacks merit" is not depriving him/her of effective assistance of counsel. Such aspects of such Code are these:

(a) The provision of S.C.R. 20.34(2) (b) that, "A lawyer as adviser furthers the interest of his or her client *by giving his or her professional opinion as to what he or she believes would likely be the ultimate decision of the courts on the matter at hand . . .*" (emphasis supplied).

(b) The provision of S.C.R. 20.34(3) (e) that, "The complexity of law often makes it difficult for a tribunal to be fully informed unless the pertinent law is presented by the lawyers in the cause. *A tribunal that is fully informed on the applicable law is better able to make a fair and accurate determination of the matter before it*" (emphasis supplied).

(c) The provision of S.C.R. 20.36(1) (b) that,

> 1. In his or her representation of a client, a lawyer may not:
>
> . . .

> b. *Knowingly, advance a claim or defense that is unwarranted under existing law,* except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law. (Emphasis supplied.)

Also supporting this sub-argument of the state is Standard 21-3.2, A.B.A. Standards for Criminal Justice. This standard, which provides that , "(b) Counsel for a defendant-appellant should not seek to withdraw from a case because of counsel's determination that the appeal lacks merit," nevertheless provides that, "Appellate counsel should give a client *his or her best professional evaluation of the questions that might be presented on appeal* . . ." (emphasis supplied; Standard 21-3.2(b) (i)). Such evaluation would surely include, if such counsel believed the appeal would be wholly frivolous, a discussion of what matters in the record might arguably support the appeal, *and why they were meritless;* a discussion, of course, which would serve the same purpose of giving full and candid advice to the defendant as that served by a no-merit brief meeting all the requirements of Rule 809.32(1), including that challenged herein.

It is noteworthy, too, that A.B.A. Standard 4-51(a) (referred to in *State v. Felton, supra,* 110 Wis. 2d at 506, as "A.B.A. Defense Function Standard 5.1(a)") reads: "After informing himself or herself fully on the facts and the law, the lawyer should advise the accused *with complete candor concerning all aspects of the case, including a candid estimate of the probable outcome*" (emphasis supplied). This standard, with its reference to "the accused," is apparently designed for trial counsel to follow,

prior to conviction or acquittal, rather than appellate counsel; but there can assuredly be no good reason why a defender, believing an appeal to be frivolous, and therefore seeking withdrawal, should not, in *rendering his client effective assistance of counsel,* advise him/her "with compplete candor concerning all aspects of the case" in its post-conviction posture, "including a candid estimate of the probable outcome." Clearly, such advice would include *all* of tha (sic) required by Rule 809.32(1).

It might be argued, of course, that while the giving of such advice to the defender's client is effective representation of counsel, it is not effective representation of counsel, but a denial thereof, to give the same advice to the court. Such an argument, however, would be based on the plainly untenable proposition that the defender must be candid with his client, but decidedly less than candid with the court, withholding from it his/her helpful explanation that the record matters cited in the no-merit brief as things which might arguably support the appeal were, in his/her judgment, meritless.

To sum up then, this sub-argument, the respondent submits that a defender complying with the challenged portion of Rule 809.32(1) in fact and in law renders effective assistance of counsel to his/her client by according him/her, through such compliance, representation clearly "equal to that which the ordinarily prudent lawyer, skilled and versed in criminal law, would give to clients who had privately retained his services."

C.

It is clear from the Petition that the relator believes that *Anders* condemns as a denial of effective assistance of counsel any functioning by the defender as an *amicus*

curiae when he seeks withdrawal on the ground that an appeal would be "wholly frivolous"; with the relator entertaining the additional belief that the act required of a defender under the challenged part of Rule 809.32(1) is that of *amicus curiae.* As above-shown and as argued more fully *infra,* respondent submits that such act is in fact one of advocacy for the defendant. It further submits, however, that one must misread *Anders* to conclude that it voices the above-described condemnation. It is true that *Anders,* as above shown, states that, "The constitutional requirement of substantial equality and fair process can only be attained *where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae"* (emphasis supplied). Read in a void, such sentence might appear to forbid a defender, seeking withdrawal because an appeal would be "wholly frivolous," from acting as *amicus curiae* in the withdrawal-seeking procedure. But *Anders* language which follows very plainly shows that the *Anders* court viewed *with approbation* the assistance which would be rendered a court wherein there was employed the procedure which *Anders* suggested be followed in the situation where a defender sought to withdraw on the ground an appeal would be "wholly frivolous." Such approbation, the state submits, is clearly given in the following portion of *Anders:*

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review *because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel.* The no-merit letter, on the other hand,

> affords neither the client nor the court *any aid.* The former must shift entirely for himself while the court has only the cold record which is (sic) must review *without the help of an advocate.* . . . (Emphasis supplied.)

Plainly, *Anders,* in its above-quoted portion, was asserting that a court would receive *amicus curiae* aid from a defender following the suggested "withdrawal" procedure set forth in *Anders,* which a court could not and did not receive from a "no-merit" letter such as was involved therein.

The petition shows reliance not only on *Anders* as allegedly supportive of relator's position herein, but also on *Evitts* as being so. Par. II of the Petition reads:

> The United States Supreme Court very recently has reaffirmed its prior holding in *Anders,* stating that the attorney ' . . . must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim.' *Evitts v. Lucey,* 83 L. Ed.2d at 828.

And Par. 15 of the Petition asserts that the action required under the challenged portion of Sec. (Rule) 809.32(1) "would be directly contrary to the *mandates* of *Anders* and *Lucey* [*Evitts*] that the attorney not brief the case against the client and that the attorney act as an advocate" (bracketed material and emphasis supplied). As above-shown, *Anders* clearly does *not* contain the "mandates" attributed to it by this part of the Petition; and just as clearly, *Evitts* contains no such "mandates." There was involved in *Evitts no question at all relative to precisely what "appointed counsel" could constitutionally do, or not do, while seeking withdrawal on the ground an*

appeal would be "wholly frivolous" and the portion of the sentence from *Evitts*[5] quoted in Par. 11 of the Petition is plainly nothing but a somewhat inaccurate paraphrase of a part of one sentence from *Anders* ("The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to *amicus curiae*"), a sentence discussed above as readily susceptible of misinterpretation if read in a void.

The Petition, Par. 12, also shows the relator placing some reliance on *Blackwell* as supportive of his position. But the language from *Blackwell* quoted in Par. 12, Petition, provides, it is submitted, no support for relator's attack on sec. (Rule) 809.32(1), Stats. The murky closing sentence thereof which reads, "The objective [sic] of these potential claims is for the court's determination, not the advocates" (emphasis and bracketed material supplied), if reasonably read as meaning, "The merit of these potential claims is for the court's determination, not the advocate's," states a proposition with which the challenged portion of sec. (Rule) 809.32(1), Stats., is not at all in conflict. Such portion requires only that the attorney to whom such rule applies, having stated in his or her no-merit brief "anything in the record that might arguably support the appeal," must then present "a *discussion* of why the issue lacks merit" (emphasis supplied). Such required "discussion" is obviously no more than that, and

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[5] Such sentence reads in full: "But the attorney must be available to assist in preparing and submitting a brief to the appellate court [authority omitted] and must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." 83 L. Ed.2d at 828.

is not intended to and does not, in any sense or degree, infringe upon what is clearly the court's power to make the determinatian as to whether or not what *Blackwell* terms "the potential claims" are meritless.

The defendant also vainly seeks some measure of support for his position in Wisconsin case law, doing so by asserting in Par. 10 of the Petition that the Wisconsin no-merit procedure which was in existence prior to the creation of Rule 809.32(1) "did not require counsel to argue against his client but demanded a fair evaluation of the record and a search for meritorious grounds therein. *Cleghorn v. State*, 55 Wis. 2d 466, 472, 198 N.W.2d 577 (1972) . . ." (emphasis supplied).

In pertinent part, *Cleghorn v. State* reads:

> . . . If the appointed attorney concludes an appeal would be frivolous, he prepares a no-merit brief and sends a copy of it to the indigent, who is given fifteen days in which to comment thereon to the supreme court. The instructions to counsel *do not require him to argue against his client* but demand a fair evaluation of the record and a search for meritorious arguments grounded thereon. . . . (Emphasis supplied; 55 Wis. 2d at 472.)

Plainly, the mere observation that "The instructions to counsel do not require him to argue against his client" does not, expressly or impliedly, condemn as a denial of the right to effective assistance of counsel the rule requirement herein challenged.

With *Cleghorn* in mind, it is certainly worthy of note that four of the Justices of the Supreme Court who were on the Court when *Cleghorn* was decided, were members

thereof when, in 1978, it adopted, *inter alia,* Rule 809.32, including the portion challenged herein.[6]

It is submitted that it is palpably absurd to suppose that such four Justices would have acted favorably on the adoption of Rule 809.32, containing the portion thereof herein challenged, had they for a moment believed that the language of *Cleghorn* above-quoted expressed or implied a belief that requiring a defender to do that which the challenged portion of Rule 809.32(1) requires would produce a denial of effective assistance of counsel to the defendant's client. And it is equally absurd to suppose that such four justices would have acted favorably on the adoption of such rule, with its specific reference to *Anders,* had they for a moment believed that *Anders* condemned as unconstitutional a key portion of such rule.

To sum up, then, the position of the State in this subargument, it is that *Anders, Evitts, Blackwell,* and *Cleghorn,* whether considered jointly or severally, simply do not enunciate any "mandate," adjudication or ruling that shows that the portion of Rule 809.32(1) herein challenged imposes a requirement on the defender which, if met, produces a denial to his client of effective assistance of counsel.

Several state courts have handed down decisions strongly supportive of the position taken by respondent in this argument.

One of such decisions is found in *Com. v. McClendon,* Pa. 434 A.2d 1185, 1187-88 (S. Ct. of Pa. 1981). Such

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[6] Such Justices were Justice (now Chief Justice Nathan S. Heffernan; Justice (and by 1978, Chief Justice) Bruce F. Beilfuss; Justice Leo B. Hanley; and Justice Connor T. Hansen.

case did *not* involve a constitutional challenge to a Pennsylvania counterpart of the portion of Rule 809.32(1) here under attack; but what it did involve was a submission of a no-merit brief by appointed counsel which, *inter alia,* contained the very thing required by such rule portion, namely, in the language of such case, "counsel's statements in the brief as to why the arguments were wholly lacking in merit" (434 A.2d at 1188) and "his [appointed counsel's] explanation of *why there is no basis for an appeal*" (bracketed material and emphasis supplied; *Id.*). In finding no ineffective representation of counsel by reason of such feature of the no-merit brief involved, the Supreme Court of Pennsylvania in *McClendon* rejected and overturned two of its earlier decisions under which a no-merit brief, including such feature, would have been viewed as ineffective representation of counsel, such cases being *Commonwealth v. Perry,* 346 A.2d 554, 555 (S. Ct. of Pa. 1975) and *Commonwealth v. Collier,* 413 A.2d 680, 681 (S. Ct. of Pa. 1980). In so doing the Court quoted at length from *Commonwealth v. Perry,* with the closing part of such quotation reading as follows:

> In his brief, after a recitation of the facts and pertinent law, counsel in a conscientious effort to be honest with the court, *then proceeded to demonstrate by reference to the record why the instant appeal is meritless. This counsel may not do.* Just as counsel may not assume the role of *amicus curiae* when he represents a client, so too, when counsel seeks to withdraw, he may not assume that role when presenting to the court anything that might arguably support an appeal. We repeat counsel's role is not that of *amicus curiae.* (Emphasis supplied.)

McClendon then stated:

The dilemma created by the *Perry* reasoning becomes apparent when we consider the definition of the term "wholly frivolous" adopted in this jurisdiction. *Commonwealth v. Greer, supra.* If the *Greer* definition of "wholly frivolous" means that there are no points present that "might arguably support an appeal" counsel is saddled with an impossible burden, if he is nevertheless required to file a brief containing arguments that are non-existent. If on the other hand, there are claims of arguable merit, even though counsel may not have any confidence in them, under *Greer* the appeal is not "wholly frivolous" and counsel is not entitled to seek leave to withdraw. *Commonwealth v. Greer, supra.* Thus following the *Perry* rationale to its logical conclusion the right of counsel to seek leave to withdraw would be illusory. We do not believe that such a result was ever intended by the United States Supreme Court.

The core of the *Anders'* reasoning is that where an accused is entitled to a counselled appellate review, that right should not be denied or diminished solely because of indigency. However, *Anders* does not require that counsel be forced to pursue a wholly frivolous appeal just because his client is indigent. *The major thrust of Anders was to assure a careful assessment of any available claims that an indigent appellant might have. That end is achieved by requiring counsel to conduct an exhaustive examination of the record* and by also placing the responsibility on the reviewing court to make an independent determination of the merit of the appeal. These requirements were clearly satisfied here. *What does present the problem is that the counsel's brief would not appear to meet the standards set by Commonwealth v. Collier, supra and Commonwealth v. Perry, supra. These cases would seem to suggest that counsel's statements in the brief as to why the arguments were wholly lacking in merit evidenced counsel's failure to assume the role of an advocate. At the same time, counsel's right to withdraw is dependent upon his certification that he fully studied the record and found no merit in the appeal.*

The fallacy in a strict adherence to the Perry rationale is obvious. Once we are satisfied with the accuracy of counsl's assessment of the appeal as being wholly frivolous, counsel has fully discharged his responsibility. The role of an advocate, insisted upon in *Anders, refers to the manner in which the record was examined in an effort to uncover grounds to support the appeal. Where counsel has in good faith satisfied that obligation and found the appeal to be wholly frivolous, he can do not [sic] more. We reject the view that his explanation of why there is no basis for an appeal should be interpreted as reflecting counsel's lack of concern in the client's cause. Nor can that fact be assigned as a reason for concluding that the client did not receive this constitutionally protected right of representation.* (Emphasis supplied.)

A second state court decision strongly supportive of respondent's position is *State v. McKenney,* 568 P.2d 1213, 98 Idaho 551 (1977). In such case, the Supreme Court of Idaho, setting forth "new guidelines governing duties of appellate counsel in the representation of indigent criminal defendants on appeal" and in so doing ruling that once counsel was appointed to represent an indigent client during appeal in a criminal case, he could not thereafter be permitted to withdraw therefrom on the basis that appeal was frivolous or lacked merit, stated, with respect to the cases of the two defendants-appellants involved:

> In each case the respective attorney examined the record and concluded that no meritorious grounds on appeal were presented. They so advised this Court

and their respective clients. Both filed briefs in which were outlined any possible arguments which could be raised in favor of their clients' appeal *and therein pointed out why such arguments would be frivolous. That procedure accords with previously enunciated standards and the principles set forth in Anders v. California, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed.2d 493 (1967). See also Idaho Appellate Rules 45(b).*

This holding, too, it is submitted, clearly supports the portion of Rule 809.32(1) attacked herein, finding the action of counsel required thereby to be in conformity with *Anders,* not in conflict therewith as is herein claimed by the relator.

It should be observed, however, that there is a case which disagrees with *Com. v. McClendon* and *State v. McKenney,* which case appears to condemn as "constitutionally inadequate" the action of counsel required by the challenged portion of Rule 809.32(1), though it goes significantly unmentioned in the petition. Such case is *Suggs v. United States,* 391 F.2d 971, 972-974 (D.C. Cir. 1968). This case is quoted (and relied upon) in one of the dissenting opinions filed in *Com. v. McClendon. See* 434 A. 2d at 1190. The State submits, however, that the better law is that found in *Com. v. McClendon* and *State v. McKenney.* And it would also appear that the *Suggs* holding has found no favor elsewhere, perhaps because its unconvincing nature is shown by its apparent belief that an appointed counsel, by showing the meritless character of any matters that might arguably support the appeal in his/her no-merit brief, might stifle or "undercut" the prospects of the client's rehabilitation! *See* 391 F.2d at 974-975.

Were a defender, who in his/her no-merit brief had complied with the rule requirement herein challenged, to

then ask the defendant, as the Apostle Paul did the Galatians, "Have I therefore become your enemy because I tell you the truth?" (Gal. 4:16), *Suggs* would answer "Yes." But how wrong such answer would be is shown, it is submitted, not only by *McClendon* and *McKenny,* but also by *Suggs* itself, in its well-reasoned dissent. *See Suggs,* 391 F.2d at p. 979-981, and especially the following portion of the dissent:

> After my study of the appellant's points and the presentation by counsel, *I will not say they had briefed the case "against" their client.* They noted rather each and every claim advanced by *Suggs* and cited seriatim the decisions of this court which had already disposed of each such claim. *It was not the brief which was "against" Suggs—the facts and the law were against him.* (Emphasis supplied; 391 F.2d at p. 980.)

E.

Finally, it is submitted that the Sixth Amendment cannot be logically or reasonably viewed as precluding a defender from giving a full and reasonable explanation to the Court of Appeals of why he believes an appeal would be frivolous. Such an explanation would not be given, of course, under a procedural rule confining the defender, believing an appeal to be frivolous, to presentation only of those matters which might arguably support the appeal, without any explanation of why such matters were meritless. The Court of Appeals should have the benefit of such an explanation, presented in the "discussion" required by sec. (Rule) 809.32(1), Stats., in passing judgment under sub. (3) of such rule as to whether "further proceedings would be frivolous and without any arguable merit", so as to warrant relieving the defender "of further responsibility

in the case." And perhaps even more important, the defendants should have the benefit of such explanation, which should assure him/her that the defender has given full and careful consideration to those matters which might arguably support the appeal, and found them meritless for good (or what defender believes to be good) reasons. The defender, it is submitted, has a professional right to submit such explanation; and indeed, with reference to the defendant, the defender, it is submitted, has both a professional and moral *duty* to give such explanation to the Court of Appeals and to the defendant. Without supplying such explanation to the court and to his/her client, the defender is in the unenviable, unprofessional, and even immoral position of seeking to withdraw from representation of the defendant on an appeal on the basis that an appeal would be frivolous, while simultaneously pointing out to the Court of Appeals matters which would arguably support the appeal! Surely the Sixth Amendment was not intended to, and does not, require a defender to demean himself/herself and the profession of the law by occupying such an ignominious position, so detrimental to his/her client, so unhelpful to the Court of Appeals, and so professionally and morally unacceptable both to the defender and his client. Indeed, respondent submits that the Sixth Amendment, rather than prohibiting what is required by the challenged portion of sec. (Rule) 809.32(1), Stats., *requires* the performance of that very act to assure defendant effectively *plenary* representation of counsel at the stage where the performance of such act is specifically required by the rule in question.

V. THE PETITION, INSOFAR AS IT SEEKS, IN THE LANGUAGE OF THIS COURT, "A DECLARATORY JUDGMENT THAT SEC. (RULE) 809.32(1), STATS., TO THE EXTENT THAT IT REQUIRES AN ATTORNEY APPOINTED TO REPRESENT A CRIMINAL DEFENDANT IN AN APPEAL TO DISCUSS IN A NO-MERIT BRIEF WHY THE ISSUES THAT MIGHT ARGUABLY SUPPORT THE APPEAL LACK MERIT, IS UNCONSTITUTIONAL" SHOULD BE DENIED BECAUSE A PRESUMPTION OF CONSTITUTIONALITY IS OPERATIVE AS TO THE PORTION OF SEC. (RULE) 809.32(1) HEREIN CHALLENGED; SUCH PRESUMPTION DERIVES ADDED STRENGTH FROM THE NATURE OF THE CREATOR OF SUCH RULE, AND THE AWARENESS OF *ANDERS* EXPRESSED THEREIN; AND SUCH STRENGTHENED PRESUMPTION MILITATES AGAINST THE GRANTING OF THE PETITION IN ITS ASPECT ABOVE MENTIONED.

The presumption of constitutionality which obtains as to a statute is so well known as to require no citation of authority; and "The same presumption applies with respect to decisions or orders of an administrative body or officer exercising powers pursuant to statutory authority, . . . " 16 C.J.S., Constitutional Law, sec. 97, pp. 310-11. The author of this memorandum has been unable to find authority (though confident it exists) that the procedural rule of a court is entitled to such presumption; but it would be absurd to suppose otherwise, where the author of such rule, as here, is the highest court of a state. It is submitted, then, that sec. (Rule) 809.32(1), including, of course, its challenged portion, is clearly entitled to a presumption of constitutionality, which militates against the

granting of the petition, insofar as it seeks a determination of the claimed constitutional invalidity of the challenged rule portion, and its striking.

Such presumption, the respondent submits, must be viewed as appreciably stronger than that operative as to a statute or administrative agency rule, by reason of the very nature of its author. Surely the highest court of a state must be expected, in its procedural rule-making, to have exercised greater skills in avoiding constitutional pitfalls, than would a state legislature or a state administrative agency, because such court can draw on its treasury of legal knowledge to avoid adoption of an unconstitutional procedural rule. And with respect to the rule in question, the presumption of its constitutionality is not only strengthened by the character of its creator, but by the fact that it express reference to *Anders* shows the Supreme Court's knowledge of such case, which presumably included a sophisticated appreciation of its constitutional meanings, express or implied.

VI. THE PETITION, INSOFAR AS IT SEEKS, IN THE LANGUAGE OF THIS COURT, "A SUPERVISORY WRIT TO PROHIBIT THE COURT OF APPEALS FROM STRIKING THE NO MERIT BRIEF PREVIOUSLY FILED IN THE APPEAL AND ORDERING COUNSEL FOR THE DEFENDANT TO PROVIDE REASONS WHY THE ISSUES PRESENTED IN THAT BRIEF LACK MERIT" SHOULD BE DENIED, NOT ONLY BECAUSE THE BRIEF FILED BY RELATOR IN THE COURT OF APPEALS FAILS TO MEET THE VALID REQUIREMENT OF THE CHALLENGED PORTION OF SEC. (RULE) 809.32 (1), STATS., BUT ALSO BECAUSE SUCH

BRIEF VIOLATES SUCH RULE IN THAT, IN A MANNER PATENTLY INCONSISTENT WITH ITS REPRESENTATION THAT AN APPEAL WOULD BE FRIVOLOUS, IT PRESENTS ARGUMENTS IN BEHALF OF THE RELATOR PRECISELY AS THEY WOULD BE PRESENTED IN THE ORDINARY, INITIAL BRIEF OF A DEFENDANT-APPELLANT ON A CRIMINAL APPEAL, WITH THEIR PRESENTATION OF SUCH ARGUMENTS IN CLEAR CONFLICT WITH BOTH *ANDERS* and SEC. (RULE) 809.32(1), STATS.

As is shown by arguments made *supra,* the challenged portion of sec. (Rule) 809.32(1) is clearly valid; and for that reason alone, the respondent submits, the supervisory writ sought by relator herein should not issue.

Even if, however, the challenged requirement of sec. (Rule) 809.32(1) were to be found invalid by this Court, it is submitted that a substantial reason exists why such writ should not issue. Such reason is that a significant portion of the purported no-merit brief filed by relator in the Court of Appeals, District I, and entitled "Brief of Defendant-Appellant" is in clear conflict with both sec. (Rule) 809.32(1) and with *Anders.* Both the suggested withdrawal procedure set forth in *Anders* and such rule require appointed counsel to direct the Court's attention to matters in the record, if any, which might arguably support the appeal, but neither such rule nor *Anders* contemplates or permits the presentation of such matters in the form of arguments made in behalf of the defendant-appellant, in form and content *completely undistinguishable from arguments which would be made in the initial brief of a defendant-appellant on a criminal appeal.* The "Brief of Defendant-Appellant" filed herein (pp. 120-135, Ap-

pendix to Petition), consistent with sec. (Rule) 809.32(1) and the suggested withdrawal procedure of *Anders*, contains the defender's representation that "This attorney has concluded that further appellate proceedings on behalf of Mr. McCoy *would be frivolous and without any arguable merit* within the meaning of *Anders v. California*, 386 U.S. 738 (1967) and Rule 809.32(1)"; but such brief then goes on, in its major portion (pp. 4-15) and throughout the first paragraph of its "Conclusion," at p. 16, to take on precisely the form of the initial brief of a defendant-appellant which is customarily presented on a criminal appeal, with such major portion of the Brief of Defendant-Appellant, at pp. 11-15, presenting four arguments, with no indication whatsoever that the relator's counsel views them as anything other than completely meritorious arguments, unequivocally advanced in behalf of the relator, and certainly with no indication that they are intended to be presented, or are presented, as mere matters of record which "might arguably support the appeal." Plainly, the Brief of Defendant-Appellant, accurately enough *not* labelled as a no-merit brief, signally flunks the test of what a no-merit brief should be, even if such brief were not required to present, as required by sec. (Rule) 809.32(1), "a discussion of why the issue lacks merit." In so doing, it provides still another sound reason for denying relator the supervisory writ he seeks herein.

CONCLUSION

For the reasons above shown, respondent submits that insofar as the Petition seeks to invoke the original jurisdiction of this Court herein, it should be granted; but that it should be denied insofar as it seeks the declaratory

judgment relief and supervisory writ relief described therein.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General
State of Wisconsin

JAMES H. McDERMOTT
Assistant Attorney General

Attorneys for Respondent

by: /s/ James H. McDermott
Assistant Attorney General

Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3859

OFFICE OF THE CLERK
SUPREME COURT
STATE OF WISCONSIN
Madison, March 27, 1986
(Title omitted in printing)
Order
Case No 86-0172-W

On January 24, 1986 a petition was filed seeking a supervisory writ to prohibit the Court of Appeals from striking the no merit brief previously filed in the appeal and ordering counsel for the defendant to provide reasons why the issues presented in that brief lacked merit. The petition also sought a declaratory judgment that sec. (Rule) 809.32(1), Stats., to the extent that it requires an attorney appointed to represent a criminal defendant in an appeal to discuss in a no merit brief why the issues that might arguably support the appeal lack merit, is unconstitutional. With respect to the latter, the petition constitutes a request for leave to commence an original action, pursuant to sec. (Rule) 809.70, Stats.

Pursuant to the court's February 21, 1986 order, a response to the petition was filed in which the respondent concurred in the request to commence an original action for declaratory judgment but objected to the granting of a supervisory writ of prohibition.

On March 13, 1986 the petitioner filed a motion requesting permission to file a brief or a reply to the respondent's brief submitted with the response. The respondent filed a response in opposition to the motion on March 19, 1986.

IT IS ORDERED that the petition, insofar as it seeks a declaratory judgment with respect to the constitutionality of sec. (Rule) 809.32(1), Stats., is granted.

IT IS FURTHER ORDERED that the petitioner shall file a brief on the merits within 40 days of the service of this order; within 30 days of the service of the petitioner's brief the respondent shall file a brief or a statement that no responsive brief will be filed; within 15 days of the service of the respondent's brief the petitioner shall file a reply brief or a statement that a reply brief will not be filed.

IT IS FURTHER ORDERED that the petition, insofar as it seeks a supervisory writ of prohibition, is held in abeyance pending further order of the court.

MARILYN L. GRAVES

Supreme Court of Wisconsin

(Title omitted in printing)

No. 86-0172-W. Argued January 5, 1987.—Decided April 9, 1987.

ABRAHAMSON, J., HEFFERMAN, C.J. and BABLITCH, J., dissent.

PETITION for declaration of rights. *Rights declared.*

For the petitioner there were briefs and oral argument by *Louis B. Butler, Jr.*, assistant state public defender.

For the respondent the cause was argued by *James H. McDermott,* assistant attorney general, with whom on the brief was *Bronson C. La Follette,* attorney general.

LOUIS J. CECI, J. In this original action for a declaratory judgment, we are called upon to consider the constitutionality of sec. (Rule) 809.32(1), Stats. (1983-84),[1] which requires that appointed counsel, upon determining that a criminal appeal would be frivolous, submit a brief to the court of appeals which includes an explanation as to why any issues which might arguably support an appeal lack merit. Petitioner Louis B. Butler, the public defender in this case who was assigned to handle the appeal of defendant Ellis T. McCoy's criminal conviction, asserts that

[1]Section 809.32(1) provides that, "If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service."

the defendant's constitutionally protected right to counsel, guaranteed by the sixth amendment to the United States Constitution and by art. I, sec. 7 of the Wisconsin Constitution, is violated by the so-called "no-merit brief" requirement. We disagree and now uphold the constitutionality of the rule contained in sec. 809.32(1).

The facts in this case are not indispute. The defendant was convicted in Milwaukee county circuit court on December 2, 1983, of one count of second-degree sexual assault, sec. 940.225(2)(a), Stats., and of one count of abduction, sec. 940.32(1).[2] In preparing for the appeal, petitioner concluded that further appellate proceedings were not warranted and that any issues which could be advanced in support of an appeal were without arguable merit under *Anders v. California,* 386 U.S. 738 (1967), and under sec. 809.32(1). Defendant was then advised of his available options, which included (1) voluntarily dismissing the appeal, (2) proceeding with the appeal *pro se,* or (3) submitting a no-merit brief, pursuant to sec. 809.32(1), to the appeals court. Defendant chose the no-merit brief option.

Prior to filing a no-merit brief, however, petitioner filed a motion in the appeals court, seeking to determine the constitutionality of sec. 809.32(1) and to clarify the scope of representation on appeal. The motion was denied on September 7, 1984, on standing grounds, with the appeals court stating that since the no-merit brief had not yet been filed, no justiciable controversy existed.

Petitioner filed a no-merit brief on October 22, 1984. The appeals court, on April 16, 1985, ordered that this

[2]*State v. Ellis T. McCoy,* No. 84-929-CR-NM.

brief be struck for noncompliance with sec. 809.32(1) and that a new brief be filed. Petitioner's brief complied with the requirements set forth in sec. 809.32(1), except that it did not contain a statement of reasons why the issues which might arguably support an appeal lacked merit.

Counsel petitioned this court on April 24, 1985, for a supervisory writ of prohibition and declaration of relator's rights, seeking to resolve the constitutional issue. On May 8, 1985, this court denied the petition, on the grounds that petitioner had an adequate remedy at law in the court of appeals. Petitioner renewed his motion in the court of appeals to determine the constitutionality of sec. 809.32(1), and the court again denied the motion, stating that any determination of the constitutionality of the no-merit rule should be made by this court. Thereafter, defense counsel renewed his petition to this court, which was granted on March 27, 1986.

Petitioner asserts that defendant's constitutionally guaranteed right to counsel, which includes the right to effective assistance of counsel, *State v. Ludwig*, 124 Wis. 2d 600, 606, 369 N.W.2d 722 (1985); *Strickland v. Washington*, 466 U.S. 668, 686 (1984), is violated by the no-merit requirement contained in sec. 809.32(1). Petitioner cites the decision of the United States Supreme Court in *Anders*, which is explicitly referred to in Wisconsin's no-merit rule, as the primary source of support for this conclusion. We agree that *Anders* should be the touchstone of our analysis, although we do not believe that it compels a finding of unconstitutionality. We therefore begin our discussion of an attorney's responsibilities to a criminal client upon appeal with an analysis of *Anders*.

In *Anders*, defense counsel, after consulting with his client and studying the trial record, determined that further appellate proceedings on behalf of his indigent client would be meritless. He so notified the appeals court by letter[3] and requested to withdraw as counsel for the defendant. The Court in *Anders* did not believe that counsel's letter, articulating only a "bare conclusion" regarding the merits of defendant's appeal, satisfied constitutional requirements. 386 U.S. at 742.

The procedure followed by defense counsel in *Anders*, the high Court held, was constitutionally defective because it "did not furnish petitioner with counsel acting in the role of advocate," *id.* at 743, and "[t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed of that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity." *Id.* at 744. The Court then explained what counsel's proper role on appeal should be:

> "[I]f counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full exami-

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[3]Counsel's letter stated, " 'I will not file a brief on appeal as I am of the opinion that there is no merit to the appeal. I have visited and communicated with Mr. Anders and have explained my views and opinions to him . . . [H]e wishes to file a brief in this matter on his own behalf.' " 386 U.S. at 742.

nation of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Id.*

"The utility of this procedure is that appointed counsel would not be force[d] . . . to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate. Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. This procedure will assure penniless defendants the same rights and opportunities on appeal—as nearly as is practicable—are are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel." *Id.* at 745.

The Wisconsin procedure goes beyond *Anders* and requires that the attorney file a brief which, in addition to articulating anything in the record which might support an appeal, includes a statement indicating why the appeal lacks merit. It is this latter requirement to which the petitioner objects and on which we now focus.

Petitioner contends that the discussion requirement is directly contrary to the court's admonition in *Anders* that counsel on appeal is not to act as *amicus curiae*, but rather is obligated to act as advocate to the best of his or her ability. For support, petitioner additionally cites *Evitts v. Lucey*, 469 U.S. 387 (1985), which states that, citing *Anders*, appellate counsel "must play the role of an active advocate, rather than a mere friend of the court assisting in a detached evaluation of the appellant's claim." *Id.* at 394. He asserts that when counsel is required to discuss the reasons why an appeal lacks merit, he or she is in effect abdicating the advocate's role and is instead arguing against the client. This, petitioner argues, is proscribed by *Anders*.

In addition, petitioner argues that a simple definitional approach compels a finding that if counsel is required to comply with the no-merit rule, he or she is no longer "advocating" appellant's cause.[4] When counsel files a no-merit brief which complies with the discussion requirement, petitioner argues, he or she is merely acting as *amicus curiae*, advancing a rationale which is more consistent with the views of the court than with the views and interests of defendant, counsel's client.[5]

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[4]According to petitioner, an advocate "is one who supports, defends or pleads another's cause."

[5]Petitioner offers two definitions of *amicus curiae*, citing *Black's Law Dictionary* 75 (5th ed. 1979), which states that *amicus curiae* "means, literally, friend of the court. A person with strong interest in or views on the subject matter of an action may petition the court for permission to file a brief, ostensibly on behalf of a party but actually to suggest a rationale consistent with its own views." Also cited is *Webster's New World Dictionary* 44 (2d ed. 1972), defining *amicus curiae* as "a person who offers, or is called in, to advise a court on some legal matter."

Petitioner then surveys cases from other jurisdictions which ostensibly support his position that appellate counsel must not deviate from the advocate's role and that the Wisconsin procedure is at odds with that principle. These cases, petitioner argues, demonstrate that counsel is not to play any part in determining the merits of the appeal. *See, e.g., State v. Allen,* 99 N.J. Super. 314, 322, 239 A.2d 675, 679 (1968), stating that "[o]nce a defendant exercises his right to appeal, his appellate counsel must be an advocate and he does not decide whether the claim will be successful as argued by the State. . . . That task is for the courts."

We do not mean to disparage the importance of counsel's role as advocate. We are sensitive to the rights of a criminal defendant, especially an indigent defendant, to effective representation. We have previously recognized, in a case decided prior to the enactment of the no-merit rule, that the *Anders* analysis compels appointed counsel to "perform his duties as adequately as paid counsel so the indigent will not be deprived of adequate representation because of his indigency." *Cleghorn v. State,* 55 Wis. 2d 466, 471, 198 N.W.2d 577 (1972). We reaffirm our belief in that principle. However, we are nevertheless compelled to reject petitioner's proffered analysis.

We now uphold the constitutionality of the no-merit brief rule. While *Anders* does not sanction the use of the discussion requirement, it does not proscribe it, either. Our interpretation of *Anders* is consistent with cases which have validated the discussion requirement and which have construed that requirement to harmonize with, rather than diverge from, the *Anders* holding. *See, United States v.*

Edwards, 777 F.2d 364 (7th Cir. 1985); *Nickols v. Gagnon,* 454 F.2d 467 (7th Cir. 1971). The court in *Edwards* explicitly reaffirmed the attorney's obligation to file a brief which includes a statement indicating why arguments ostensibly supporting an appeal are without merit. 777 F.2d at 365-66. Similarly, in *Nickols,* the seventh circuit examined the adequacy of a letter, which included a discussion of "matter[s] demonstrating the absence of merit [of issues arguably supporting an appeal]," submitted by the defense attorney who was seeking to withdraw as counsel. 454 F.2d at 469. In deciding that the letter was adequate, the court contrasted counsel's letter which "included a reasoned exposition of the basis for his conclusion," *id.,* with the short letter submitted by counsel in *Anders,* which contained only a "conclusory statement" of the frivolity of the appeal. *Id.,* n. 4. Thus, the court in *Nickols* also contemplated, consistent with sec. 809.32(1), Stats., the discussion requirement and, further, did not believe that *Anders* in any way prohibited it. Likewise, we do not believe that *Anders* in any way prohibits it. Petitioner's reliance on *Evitts* is also misplaced, because it does not prohibit the discussion requirement, either.

Petitioner argues that when an attorney submits a statement which includes a discussion of why his or her client's appeal lacks merit, that attorney is, in effect, like the judge, "deciding" the merits of the appeal. This, petitioner argues, is impermissible because "[i]t is not counsel's prerogative to determine finally the merits of an appeal, but, as directed in *Anders,* 'the court—not counsel . . . decide[s] whether the case is wholly frivolous.'" *Turner v. Haynes,* 162 W. Va. 33, —, 245 S.E.2d 629, 631 (1978). *See also, Rhodes v. Leverette,* 160 W. Va. 781,

239 S.E.2d 136 (1977); *People v. Feggans,* 67 Cal. 2d 444, 432 P.2d 21, 62 Cal. Rptr. 419 (1967); *State v. Varner,* 692 P.2d 753 (Utah 1984); *State v. Shattuck,* 140 Ariz. 582, 684 P.2d 154 (1984); *State v. Duncan,* 57 Ohio App. 2d 93, 385 N.E.2d 323 (1978).

We similarly believe that it is ultimately the court's, and not counsel's, prerogative to judge the relative merits of an appeal; nevertheless, we do not believe that the case authority cited by petitioner compels a finding that the discussion rule is unconstitutional. For example, counsel in *Turner* concluded that his client's appeal prospects would be without merit and so informed his client. Counsel, however, did not provide his client with a copy of the trial transcript, and an appeal was never pursued. In addressing defendant's claim that counsel's actions deprived him of his right to appeal, the court held that, applying *Anders,* counsel did not fulfill his obligation to his client. The court reasoned that counsel—not the court—ultimately decided that the appeal was without merit. 162 W. Va. at —, 245 S.E.2d at 631. It is evident that the court in *Turner* was never even given the opportunity to decide whether it agreed with counsel's conclusion of lack of merit. This was the constitutional infirmity.

For a similar holding, *see, Allen,* 99 N.J. Super. 314, 239 A.2d 675, where the court also found that defendant was deprived of his right to effective assistance of counsel. The defendant was not informed by his attorney that he had the right to appeal or that he had the right to counsel to prosecute an appeal. Again, the court there was never given the opportunity to decide whether counsel's conclusion that the appeal was meritless was adequately

supported by case law, the record, or the applicable statutes.

To the contrary, when a court in Wisconsin is presented with counsel's conclusion that an appeal would be meritless and in addition has before it a summary of the case or statutory authorities which might compel that conclusion, it, and not counsel, decides whether the discussion of why the appeal lacks merit should be accepted. If the Wisconsin rule merely permitted counsel to summarily conclude that the appeal was meritless, without including even a perfunctory discussion of the applicable facts or case authorities in support of that conclusion, *see, e.g., Feggans,* 67 Cal. 2d at 448, 432 P.2d at 23-24, 62 Cal. Rptr. at —, the same concerns raised in *Anders* regarding the constitutional insufficiency of a mere conclusory statement of no merit might arguably apply. That, however, is not the situation here.

We interpret the discussion rule to require a statement of reasons why the appeal lacks merit which might include, for example, a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same result. We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with "notice" that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit. Thus, we do not believe the rule requires an attorney to argue against the client; rather, we believe the rule requires an attorney to

fulfill a duty that co-exists with the duty owed to the client —that duty which is owed to the court. The court will be better equipped to make the correct decision about the potential merits of the appeal if it has before it not only the authorities which might favor an appeal, but also the authorities which might militate against it. The court, as *Anders* mandates, is still the final arbiter, and it alone has the responsibility to determine whether the appeal is, in fact, frivolous. Our decision does not deviate from that principle.

We believe that the Wisconsin procedure serves several useful functions. In addition to providing the court with assistance in its review of the record, it assures the court that counsel has "discharged his obligation to his client in a competent and professional manner." *Nickols,* 454 F.2d at 470. That is, the Wisconsin procedure assures the reviewing court that an indigent defendant is receiving exactly that type and level of assistance that a paying client would be receiving under similar circumstances. When the court has before it a reasoned summary of the law militating against further appellate proceedings, it can be assured that the attorney has made an inquiry into the relative merits of the appeal and that the attorney's withdrawal request is valid and grounded in fact and in the law.

The Wisconsin procedure, once again, can be contrasted to that followed in *Anders,* where the attorney simply stated that an appeal would be frivolous and so informed the court in conclusory fashion. It was this conclusoriness that the court found constitutionally offensive in *Anders,* 386 U.S. at 742, because it was indicative of

or at least implied a lack of diligence and preparation by the attorney such that it was evident that the criminal defendant was not obtaining the same type and quality of representation that he or she was likely to obtain from private counsel. Since the Wisconsin procedure avoids the type of conclusoriness that *Anders* found offensive, the same concerns raised in *Anders* regarding the quality and equality of attorney representation are simply not as relevant here.

There is case support in other jurisdictions for the conclusion we have reached. *See, Caraway v. Texas,* 560 S.W.2d 690, 691 (Tex. Crim. 1978); *People v. Lowery,* 86 A.D.2d 537, 538, 445 N.Y.S.2d 992, 993 (1982), stating that "[a] mere mechanical statement that there are no valid issues that could legitimately be raised on an appeal is insufficient"; *Smith v. State,* 496 So. 2d 971, 974 (Fla. Dist. Ct. App. 1986); *Commonwealth v. McClendon,* 495 Pa. 467, 473, 434 A.2d 1185, 1188 (1981).

We reiterate that an indigent criminal defendant, while undisputedly entitled to receive the same level of representation that a paying defendant would receive, is not entitled to receive more than a paying client would receive. *See, e.g., Nickols,* 454 F.2d at 472-73. "When [the] attorney has reviewed the law and the record as an advocate and determines that there are no non-frivolous issues to be raised on appeal, the appellant has received what is constitutionally required." *State v. Horine,* 64 Or. App. 532, 548, 669 P.2d 797, 806 (1983).[6]

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[6]Although involving a slightly different fact situation, *McClendon* is particularly instructive since it included a detailed

(Continued on following page)

A final consideration which we believe is important to our decision is one which has been alluded to already, namely, the discussion requirement serves as a significant administrative aid to the reviewing court. It first provides a basis for the reviewing court to judge whether an appeal is meritorious. The brief in support of appeal, combined with the "no-merit" discussion, gives the court far more than just a "cold record" to look at; rather, the court has before it both the arguments in support of an appeal and a statement which at least refers to case authorities or factual references which do not support an appeal. Thus, the court has a substantial base of authority to refer to in making its own, independent evaluation of the case. This makes it less likely that the court will overlook important legal authorities which would either support or militate against continued appellate proceedings. Hence, the discussion requirement operates as a judicial aid, serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner. With an increase in the number of criminal appeals, this concern should be obvious.

(Continued from previous page)

statement regarding the "discussion of lack of merit" requirement. It stated that, "Once we are satisfied with the accuracy of counsel's assessment of the appeal as being wholly frivolous, counsel has fully discharged his responsibility. The role of an advocate, insisted upon in *Anders*, refers to the manner in which the record was examined in an effort to uncover grounds to support the appeal. Where counsel has in good faith satisfied that obligation and found the appeal to be wholly frivolous, he can do no more. We reject the view that his explanation of why there is no basis for an appeal should be interpreted as reflecting counsel's lack of concern in the client's cause. Nor can that fact be assigned as a reason for concluding that the client did not receive this constitutionally protected right of representation." 495 Pa. at 473-74, 434 A.2d at 1188.

Because we find that adherence to sec. 809.32(1), Stats., does not operate to deprive defendant of any of his constitutional rights, and given the other significant considerations we have enumerated, we affirm the constitutionality of the Wisconsin procedure. Therefore, the petition for a supervisory writ of prohibition is denied.

By the Court.—Rights declared.

SHIRLEY S. ABRAHAMSON, J. (dissenting). Our court rule requiring an appointed appellate defense lawyer in a criminal case to explain in a no-merit report the weaknesses in the client's appeal contravenes the *Anders* decision of the United States Supreme Court, complicates the already complex ethical dilemma faced by an appointed defense lawyer who decides that an appeal of the client's case would be frivolous, and is unnecessary to achieve the purposes which the majority believes justify the imposition of the requirement. Because I believe that our rule violates the defendant's sixth amendment right to effective assistance of counsel, and because I believe this court should respond by commissioning a study of a court rule when, as in this case, a challenge to a court rule reveals flaws in the rule, I dissent.

In *Anders v. California*, 386 U.S. 738 (1967), the United States Supreme Court undertook the difficult task of reconciling the professional and personal integrity of appointed appellate defense counsel with the constitutional right of criminal defendants to the assistance of counsel. ABA Standards Relating to the Defense Function, sec. 4-8.3, Commentary (2d ed. 1980). The Court achieved this reconciliation by providing that counsel convinced of the frivciliation by providing that counsel convinced of the frivfrom the case by following certain procedures, including

filing a brief with the court that identifies "anything in the record that might arguably support the appeal." *Anders* appears to rest on the distinction between complete frivolity and absence of merit, the former justifying withdrawal, the latter not justifying withdrawal. *But see Cleghorn v. State,* 55 Wis. 2d 466, 475, 198 N.W.2d 577 (1972). *Anders* has been criticized as forcing appointed appellate defense attorneys to "brief the unbriefable," because a defense attorney who could find something in the record arguably supporting an appeal would not request to withdraw in the first place. ABA Standards Relating to the Defense Function, sec. 4-8.3, Commentary.

The *Anders* decision has drawn more than its share of criticism from courts, commentators and practitioners. Courts have interpreted *Anders* in a wide variety of ways and have adopted alternate mechanisms for dealing with the difficult dilemma at the heart of the case. *See, e.g., State v. Horine,* 64 Or. App. 532, 669 P.2d 797 (Ct. App. 1983); *State v. McKenney,* 98 Idaho 551, 568 P.2d 1213 (1977); *People v. Wende,* 25 Cal. 3d 436, 158 Cal. Rptr. 839, 600 P.2d 1071 (1979). Commentators have found little that pleases them with the decision. *See, e.g.,* Hermann, *Frivolous Criminal Appeals,* 47 N.Y.U.L. Rev. 701 (1972); Pengilly, *Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal,* 9 Crim. Just. J. 45 (1986). Finally, practitioners find the *Anders* procedure either unworkable or distasteful or both.

Nevertheless, *Anders* is, as the majority points out, the "touchstone" of analysis in this case. *Anders* requires an appointed appellate defense attorney to act as an advocate even as he or she requests to withdraw from a case. The majority asserts that the discussion requirement in the

court rule at issue in this case keeps appointed appellate defense counsel in the role of advocate because it insures "that the attorney has made an inquiry into the relative merits of the appeal and that the attorney's withdrawal request is valid and grounded in fact and in the law." Majority opinion at page 10. It is not, however, the requirement that counsel search the record and research the law that the petitioner objects to in this case, but rather the requirement that counsel then place before the court any arguments that he or she has discovered which militate against the client's cause.

The United States Supreme Court specifically noted that it did not intend to "force appointed counsel to brief his case against his client." Defense counsel should be the client's advocate, not adversary. *Anders,* 386 U.S. at 745.

The majority explains that appointed appellate defense counsel's inclusion of arguments against the defendant is necessary to put the court on notice that the arguments in favor of the client are frivolous and to assist the court to make a correct decision about the potential merits of the appeal. Majority opinion at pages 9-10, 12. As the court recognized in *Anders,* 386 U.S. at 745, however, appointed appellate defense counsel provides sufficient assistance to the court simply by pointing out the possible arguments for the client. Appointed appellate criminal defense counsel's request to withdraw in itself puts the court on notice that counsel considers the arguments in the no-merit brief frivolous. Once raised, frivolous arguments by their very nature should not be difficult for a court to evaluate on its own without counsel supplying case authorities or factual references which militate against the appeal. Consequently, I conclude that there is no need to require de-

fense counsel to assist the court by briefing the case against the client.

Counsel's filing a brief setting forth arguments against defendant's position is a task that benefits the court but not the client. Accordingly, such a task is more properly assigned to an amicus curiae than to an advocate. The *Anders* court condemned procedures that place appointed appellate defense counsel in the role of amicus curiae rather than in the role of advocate for the defendant. 386 U.S. at 744. The Wisconsin requirement that appointed appellate defense counsel who files a no-merit brief must discuss therein the reasons why the appeal lacks merit violates the plain meaning and clear intent of *Anders* by transforming appointed appellate defense counsel from an advocate into an adversary or an amicus.

The disenchantment with our rule evidenced in this case and the widespread disenchantment with *Anders* indicate that the dilemma of appointed counsel who does not wish to prosecute a frivolous appeal deserves additional study to devise a solution that is more satisfactory to counsel yet is equally sensitive to the rights of indigent defendants, to the responsibilities of appointed counsel, and to the needs of the judicial system.

In its rulemaking capacity this court has the power to authorize a study of the rule and its effect on appointed appellate defense attorneys who feel that their clients' appeals are frivolous but who nevertheless cannot dissuade their clients from prosecuting the appeals. Such a study is the kind of response that this court should consider when presented with a challenge that raises significant doubts concerning the wisdom of the rule, even if the constitutional

arguments against the rule do not persuade the court. Thus, I believe that even if the majority is convinced the rule is constitutional, it should initiate a reconsideration of the rule.

Accordingly, I dissent.

I am authorized to state that CHIEF JUSTICE NATHAN S. HEFFERNAN and JUSTICE WILLIAM A. BABLITCH join in this dissent.

STATE OF WISCONSIN
IN SUPREME COURT

Case No. 86-0172-W

(Title omitted in printing)

NOTICE OF APPEAL
(Filed May 21, 1987)

TO: Marilyn L. Graves, Clerk
Wisconsin Supreme Court and
Court of Appeals
231 East, State Capitol
P.O. Box 1688
Madison, WI 53707

James McDermott
Assistant Attorney General
Attorney for Wisconsin
Court of Appeals
123 W. Washington Ave.
P.O. Box 7857
Madison, WI 53707

PLEASE TAKE NOTICE that the above-named petitioner-appellant, State of Wisconsin ex rel. Ellis T. McCoy, by Attorney Louis B. Butler, Jr., Assistant State Public Defender, appeals to the United States Supreme Court from the final judgment or decree of the Wisconsin Supreme Court, entered April 9, 1987, wherein the Wisconsin Supreme Court upheld the constitutional validity of Rule 809.32(1), Stats. (1983-84) which requires appellate counsel to state reasons in a "no merit brief" why the case lacks merit, pursuant to 28 U.S.C. § 1257(2).

Dated this 20 day of May, 1987.

Respectfully submitted,

/s/ LOUIS B. BUTLER, JR.
Assistant State Public Defender

819 North Sixth Street, Room 821
Milwaukee, WI 53203
Telephone (414) 227-4891

Attorney for Defendant-Appellant.

SUPREME COURT OF THE UNITED STATES

No. 87-5002

Ellis T. McCoy,

Appellant

v.

Wisconsin

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN.

ON CONSIDERATION of the motion for leave to proceed *in forma pauperis* it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

October 5, 1987

Supreme Court, U.S.
FILED
NOV 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ELLIS T. McCOY, Etc.,

Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,

Appellee.

On Appeal From The
Supreme Court of Wisconsin

BRIEF FOR THE APPELLANT

LOUIS B. BUTLER, JR.
Assistant Wisconsin Public Defender
819 North Sixth Street, Room 821
Milwaukee, Wisconsin 53203
(414) 227-4891
Counsel for Appellant.

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

QUESTION PRESENTED

Is Wis. Rule § 809.32(1) unconstitutional to the extent that it requires a defense attorney in a criminal appeal to discuss in a no merit brief why the issue that might arguably support the appeal lacks merit?

PARTIES BELOW

The parties in the Supreme Court of Wisconsin were petitioner State of Wisconsin ex rel. Ellis T. McCoy, by Louis B. Butler, Jr., Assistant Wisconsin Public Defender, Relator Ellis T. McCoy and the Wisconsin Court of Appeals, District I.

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OPINION BELOW

The opinion of the Wisconsin Supreme Court is reported as *State of Wisconsin ex rel. Ellis T. McCoy* v. *Wisconsin Court of Appeals, District I*, 137 Wis. 2d 90, 403 N.W.2d 449 (1987). (J.A. 108-125).

JURISDICTION

The decision of the Wisconsin Supreme Court was entered April 9, 1987. The appellant's notice of appeal was filed in the Wisconsin Supreme Court on May 21, 1987, and docketed in this Court on May 22, 1987. Probable jurisdiction was noted in this Court on October 5, 1987. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257 (1970).

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENTS TO THE UNITED STATES CONSTITUTION

ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses in his favor, and to have the Assistance of Counsel for his defence.

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any

person within its jurisdiction the equal protection of the laws.

WISCONSIN CONSTITUTION

ARTICLE I

Rights of Accused. SECTION 7. In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

Prosecutions; double jeopardy; self-incrimination; bail; habeas corpus. SECTION 8. [As amended Nov. 1870 and April 1981] (1) No person may be held to answer for a criminal offense without due process of law, and no person for the same offense may be put twice in jeopardy of punishment, nor may be compelled in any criminal case to be a witness against himself or herself.

Rights of suitors. SECTION 21. [As amended April 1977] (1) Writs of error shall never be prohibited, and shall be issued by such courts as the legislature designates by law.

(2) In any court of this state, any suitor may prosecute or defend his suit either in his own proper person or by an attorney of the suitor's choice. [1975 J.R. 13, 1977, J.R. 7, vote April 1977]

WISCONSIN STATUTES AND COURT RULES INVOLVED

808.03 (1983-84) Appeals to the court of appeals. (1) APPEALS AS OF RIGHT. A final judgment or a final order of a circuit court may be appealed as a

matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order entered in accordance with s. 806.06(1)(b) or 807.11(2) or a disposition recorded in docket entries in traffic regulation cases and municipal ordinance violation cases prosecuted in circuit court which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

809.25(1983-84) Rule . . . .

(3) FRIVOLOUS APPEALS. (a) If an appeal or cross-appeal is found to be frivolous by the court, the court shall award to the successful party costs and fees under this section.

(b) The costs and fees awarded under par. (a) may be assessed fully against the appellant or cross-appellant or the attorney representing the appellant or cross-appellant or may be assessed so that the appellant or cross-appellant and the attorney each pay a portion of the costs and fees.

(c) In order to find an appeal or cross-appeal to be frivolous under par. (a), the court must find one or more of the following:

1. The appeal or cross-appeal was filed, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

2. The party or the party's attorney knew, or should have known, that the appeal or cross-appeal was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

. . . .

809.30 (1983-84) Rule (Appeals in felony cases). (1) APPEAL OR POSTCONVICTION MOTION BY DEFENDANT. (a) An appeal or motion for postcon-

viction relief by a defendant in a felony case must be taken in accordance with this subsection.

(b) The trial judge shall inform the defendant at the time of sentencing or imposition of a fine or probation of the right to appeal or seek other postconviction relief, the time limits on seeking the relief and, if indigent, the right to publicly compensated counsel in those proceedings.

(c) If the defendant claims or appears to be indigent and wishes to have publicly compensated counsel to represent the defendant in seeking postconviction relief, the defendant shall notify the state public defender within 45 days of the date of sentencing or imposition of fine or probation. The state public defender shall within 60 days of notification by the defendant determine the defendant's indigency and appoint counsel as provided in ch. 977, and at the same time shall request the court reporter to prepare the transcript of notes of the proceedings in the case.

. . . .

809.32 (1983-84) Rule (No merit reports) (1). If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service.

(2) The attorney shall file in the trial court a notice of appeal of the judgment of conviction and of any order denying a postconviction motion. The clerk of the trial court shall transmit the record in the case

to the court pursuant to s. 809.15. The no merit brief and notice of appeal must be filed within 180 days of the service upon the defendant of the transcript under s. 809.30(1)(e).

(3) In the event the court of appeals finds that further appellate proceedings would be frivolous and without any arguable merit, the court of appeals shall affirm the judgment of conviction and the denial of any postconviction motion and relieve the attorney of further responsibility in the case. The attorney shall advise the defendant of the right to file a petition for review to the supreme court under s. 809.62.

(4) If a fully briefed appeal is taken to the court of appeals and the attorney is of the opinion that a petition for review in the supreme court under s. 809.62 would be frivolous and without any arguable merit, the attorney shall advise the defendant of the reasons for this opinion and that the defendant has the right to file a petition for review. If requested by the defendant, the attorney shall file a petition satisfying the requirements of s. 809.62(2)(d) and (f) and the defendant shall file a supplemental petition satisfying the requirements of s. 809.62(2)(a), (b), (c) and (e). The petition and supplemental petition shall both be filed within 30 days of the date of the decision of the court of appeals. An opposing party may file a response to the petition and supplemental petition within 10 days of the service of the supplemental petition.

967.06 (1983-94) Determination of indigency; appointment of counsel; preparation of record. As soon as practicable after a person has been detained or arrested in connection with any offense which is punishable by incarceration, or in connection with any civil commitment proceeding, or in any other situation in which a person is entitled to counsel regardless of ability to pay under the constitution or laws of the United States or this state, the person shall be informed of his or her right to counsel. Per-

sons who indicate at any time that they wish to be represented by a lawyer, and who claim that they are not able to pay in full for a lawyer's services, shall immediately be permitted to contact the authority for indigency determinations specified under s. 977.07(1). The authority for indigency determination in each county shall have daily telephone access to the county jail in order to identify all persons who are being held in the jail. The jail personnel shall provide by phone information requested by the authority. In any case in which the state public defender provides representation to an indigent person, the public defender may request that the applicable court reporter or clerk of courts prepare and transmit any transcript or court record. The request shall be complied with. The county treasurer shall compensate the court reporter or clerk of courts for the preparation and transmittal of the documents, upon the written statement of the state public defender that the documents were required in order to provide representation to the indigent person.

STATEMENT OF THE CASE

This matter is before the court on appeal from an original action before the Wisconsin Supreme Court. It arises, however, out of the case of *State* v. *Ellis T. McCoy*, No. 84-929-CR-NM (J.A. 11). Mr. McCoy was convicted in Milwaukee County Circuit Court on December 2, 1983, of one count of second degree sexual assault, contrary to Wis. Stats. § 940.225(2)(a) (1983-84), and one count of abduction, contrary to Wis. Stats. § 940.32(1) (1983-84), the Honorable William A. Jennaro presiding (J.A. 17-18). Upon conviction, he was sentenced to six years, each count, to be served consecutively at the Dodge Correctional Institution at Waupun, Wisconsin (J.A. 18).

The petitioner in the Wisconsin Supreme Court represents the appellant, Ellis T. McCoy, in the case of *State* v.

McCoy, No. 84-929-CR-NM, now pending in the Wisconsin Court of Appeals, District I (J.A. 4). After doing research in preparation for filing the brief in that action, counsel concluded that further appellate proceedings on behalf of Mr. McCoy would be frivolous and without any arguable merit within the meaning of *Anders* v. *California*, 386 U.S. 738 (1967) and Rule § 809.32(1) (J.A. 4-5). Counsel discussed the matter by telephone twice with Mr. McCoy, who was advised that his options included voluntarily dismissing the appeal, proceeding *pro se* or requiring the petitioner to file a no merit report (J.A. 5). Mr. McCoy opted for a no merit report (J.A. 5).

A motion was filed on behalf of Mr. McCoy before the Wisconsin Court of Appeals on August 14, 1984, to determine the constitutionality of Rule 809.32(1) and clarify the scope of counsel's representation on appeal (J.A. 5-7). The motion alleged that that portion of Rule 809.32(1) which requires a discussion of why the appeal lacks merit would infringe on McCoy's sixth amendment right to counsel (J.A. 6-7).

The Wisconsin Court of Appeals, District I, denied the motion on September 7, 1984, ruling that because a no merit report had not been filed, "the defendant has not and cannot claim that he was deprived of his right to assistance of counsel. Consequently, no justiciable controversy exists involving the constitutionality issue." (J.A. 8-9).

Counsel filed a "no merit" brief on October 22, 1984, which was in compliance with *Anders* and the subsequent decision of *Evitts* v. *Lucey*, 469 U.S. 387, 394 (1985), but not in compliance with Wis. Rule § 809.32(1) (J.A. 11-27). In an introduction to that brief, counsel pointed out that the rule and *Anders* could not be reconciled, and that

he was ethically obligated to protect his client's sixth amendment right to counsel on appeal (J.A. 14-16). A copy of the no merit brief was served on McCoy, who was given 30 days to file any response he wished the court to consider (J.A. 28).

The court of appeals, in an order dated April 16, 1985, ordered that the brief previously filed on October 22, 1984, be struck for noncompliance with Wis. Rule § 809.32(1) because reasons why the issues lacked merit were not included (J.A. 29-30). The court also ordered that counsel file a new brief which was in compliance with the rule within fifteen (15) days of the date of that order (J.A. 30).

Counsel filed a petition for a supervisory writ of prohibition and declaration of relator's rights in the Wisconsin Supreme Court dated April 23, 1985 (J.A. 31-36). [app. omitted]. The court, however, in an order dated May 8, 1985, ruled that counsel was not entitled to a supervisory writ and declaratory relief from that court for the reason "that he has an adequate remedy in the court of appeals by renewing his motion for a determination of constitutionality of sec. (Rule) 809.32(1), Stats." (J.A. 37-38).

Counsel renewed his "Motion to Determine Constitutionality of Rule 809.32(1) and to Clarify Scope of Attorney's Representation on Appeal" in the court of appeals in a motion dated June 4, 1985 (J.A. 39-44). [App. omitted]. The court of appeals once again denied counsel's motion in an order amended January 16, 1986, stating that the "constitutionality of sec. 809.32(1), Stats., must be determined by its supreme court authors and not by a court bound to obey what the court creates." (J.A. 46). The court again directed counsel to file a brief in compliance with Wis. Rule § 809.32(2) within fifteen (15) days of the date of the order (J.A. 47).

Counsel renewed his "Petition for Supervisory Writ of Prohibition and Declaration of Relator's Rights" in the Wisconsin Supreme Court on January 24, 1986 (J.A. 48-55). The court granted the petition, insofar as it sought a declaratory judgment with respect to the constitutionality of Wis. Rule § 809.32(1) in an order dated March 27, 1986 (J.A. 106-107). The court also held the petition for a supervisory writ of prohibition in abeyance pending further order of the court (J.A. 107).

The Wisconsin Supreme Court, in a decision entered April 9, 1987, upheld the constitutionality of Wis. Rule § 809.32(1). *McCoy, supra* (J.A. 108-125). The court admitted that the Wisconsin no merit procedure goes beyond *Anders* and requires an attorney to file a brief which includes a statement indicating why the appeal lacks merit. 137 Wis. 2d at 95 (J.A. 112). The court, however, stated that "[w]hile Anders does not sanction the use of the discussion requirement, it does not proscribe it, either." 137 Wis. 2d at 97 (J.A. 114). The court stated that ". . . we believe the rule requires an attorney to fulfill a duty that co-exists with the duty owed to the client—that duty which is owed to the court. The court will be better equipped to make the correct decision about the potential merits of the appeal if it has before it not only the authorities which might favor an appeal, but also the authorities which might militate against it." 137 Wis. 2d at 100-101 (J.A. 117-118). The court added, ". . . the discussion requirement serves as a significant administrative aid to the reviewing court. . . . Hence, the discussion requirement operates as a judicial aid, serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner." 137 Wis. 2d at 103 (J.A. 120).

Three of the seven justices dissented on the ground that the no merit rule violated the defendant's sixth amend-

ment right to effective assistance of counsel. 137 Wis. 2d at 104 (J.A. 121). The dissent noted that "(c)ounsel's filing a brief setting forth arguments against the defendant's position is a task that benefits the court but not the client. Accordingly, such a task is more properly assigned to an *amicus curiae* than the advocate." 137 Wis. 2d at 106-107 (J.A. 124).

SUMMARY OF ARGUMENT

The Wisconsin Supreme Court in this action has upheld the constitutionality of Wis. Rule § 809.32(1) which requires appointed counsel on an appeal as a matter of right to state in a no merit brief why any issues which might arguably support an appeal lack merit. This requirement is contrary to this Court's prior decisions of *Anders* v. *California*, 386 U.S. 738 (1967) and *Ellis* v. *United States*, 356 U.S. 674 (1958) which require counsel to act as an active advocate on behalf of his client, as opposed to acting in the role of *amicus curiae*. By following the rule and providing the court with reasons why an appeal of right lacks merit, counsel would effectively deprive his client of his right to an appeal, to due process on appeal, and to effective assistance of counsel. That rule, insofar as it requires a statement of reasons why the appeal lacks merit, is, therefore, contrary to the Sixth and Fourteenth Amendments to the United States Constitution.

ARGUMENT

WISCONSIN RULE § 809.32(1) DEPRIVES MR. MCCOY OF HIS RIGHTS TO APPEAL, TO DUE PROCESS ON APPEAL, AND TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL INSOFAR AS IT REQUIRES APPELLATE COUNSEL TO PROVIDE THE COURT WITH REASONS WHY A "NO MERIT" APPEAL LACKS MERIT.

Wisconsin law provides that all persons convicted of a crime be provided an appeal as a matter of right. Article I,

sec. 21, Wis. Const.; Wis. Stat. § 808.03 (1983-84); and Wis. Rule § 809.30 (1)(b). *See also State of Wisconsin* v. *Albright*, 96 Wis. 2d 122, 129-131, 291 N.W.2d 487 (1980). Moreover, art. I, sec. 7 of the Wisconsin Constitution provides a criminal defendant with the right to counsel, which includes effective assistance of counsel. *State of Wisconsin* v. *Koller*, 87 Wis. 2d 253, 260-261, 274 N.W. 2d 651 (1979). An indigent defendant has a right to publicly compensated counsel on appeal. Wis. Rule § 809.30(1)(b); Wis. Stats § 967.06 (1983-84). And finally, the Wisconsin Constitution provides for due process, which includes due process on appeal. Art. I, sec. 8, Wis. Const. *See also*, *Evitts* v. *Lucey*, 469 U.S. 387, 393 (1985). At issue in this case is whether another rule, Wis. Rule § 809.32(1), deprives a criminal defendant of his constitutional rights to an appeal, to due process in the appeal, and to effective assistance of counsel, contrary to the Sixth and Fourteenth Amendments to the United States Constitution.

Wis. Rule § 809.32(1) provides that if an attorney is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without arguable merit within the meaning of *Anders* v. *California*, 386 U.S. 738 (1967), the attorney shall file with the court of appeals a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. Appellant contends that the discussion requirement contained within the rule violates his right to appeal, to due process on appeal and to effective assistance of counsel.

This Court previously examined the role of appointed appellate counsel in *Anders* v. *California*, *supra*. The Court in *Anders* ruled that the constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate on behalf of his client, as opposed to that of *amicus*

curiae. 386 U.S. at 744. The court stated that counsel's role as advocate requires that he support his (or her) client's appeal to the best of his ability. *Id.* If counsel finds the case to be frivolous, he should so advise the court and request permission to withdraw. *Id.* That request must be accompanied by a brief referring to anything in the record that might arguably support the appeal. *Id.* After a copy is furnished to the defendant with time allowed to raise any points he chooses, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* If the appeal is frivolous, the court may grant the request to withdraw and dismiss the appeal, and if not, then the defendant is entitled to appointed counsel for the appeal. The court stated that:

> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

Id. at 745.

In reaching its landmark decision, the court rejected the California procedure where appointed counsel thoroughly studies the record, consults with the defendant and trial counsel and conscientiously concludes, and so advises the appellate court, that there are no meritorious grounds of appeal. *Id.* at 740-741, n. 2. The court then independently reviews the record. *Id.* In reaching its conclusion that the California procedure violated the fourteenth amendment, the court noted that it could not say that counsel acted in any greater capacity than merely as *amicus curiae*, that the procedure did not furnish petitioner with counsel acting in the role of an advocate, and that the procedure did not provide that full consideration

and resolution of the matter as is obtained when counsel is acting as an advocate. *Id.* at 743.

The Court's decision in *Anders*, in setting forth an acceptable procedure in "no merit" cases, appears to foreclose the discussion requirement in Wisconsin's "no merit" procedure, because a discussion of why issues lack merit would necessarily preclude counsel from acting in the role of an "advocate" on behalf of the client, at least in the ordinary meaning of the term. According to *Black's Law Dictionary*, 51 (5th Ed. 1979), the term advocate has the following definitions:

> Advocate. . . v. to speak in favor of or defend by argument. To support, vindicate, or recommend publicly.
>
> Advocate. . . n. One who assists, defends, or pleads for another. One who renders legal advice and aid and pleads the cause of another before a court or tribunal, a counselor. A person learned in the law, and duly admitted to practice who assists his client with advice, and pleads for him in open court. An assistant; adviser; a pleader of causes.

Webster's New World Dictionary, 20-21 (2d Ed. 1972), similarly defines advocate as "1. A person who pleads another's cause; specif., a lawyer. 2. A person who speaks or writes in support of something. . . . to speak or write in support of; be in favor of - SYN. see SUPPORT . . ." As these definitions clearly indicate, then, an advocate is one who supports, defends or pleads another's cause.

In contrast, the term "*amicus curiae*" has been defined as follows:

> ". . . means literally, friend of the court. A person with strong interest in or views on the subject matter of an action may petition the court for permission to file a brief, ostensibly on behalf of a party but actually

> to suggest a rationale consistent with its own views. . ."

Black's Law Dictionary, 75 (5th Ed. 1979).

> ". . . a person who offers, or is called in, to advise a court on some legal matter."

Webster's New World Dictionary, 44 (2d Ed. 1972). Thus, any person who files a brief suggesting a rationale consistent with his or her own views in an effort to aid or advise the court is acting in the role of *amicus curiae.*

While the court in *Anders* did not define what it meant by the term "advocate", a review of other decisions of this court fully supports appellant's contention that the discussion requirement is unconstitutional and contrary to the meaning and spirit of the *Anders* decision. In *United States* v. *Cronic*, 466 U.S. 648 (1984), this Court described the underlying purpose of the constitution's guarantee of the effective assistance of counsel when it stated that "truth . . . is best discovered by powerful statements on both sides of the question." *Id.* at 655. The court noted that this dictum described the unique strength of our criminal justice system, and went on to state that "[t]he very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Id., citing Herring* v. *New York*, 422 U.S. 853, 862 (1975). The court stated that it is that "very premise" that underlies and gives meaning to the sixth amendment. *Id.*, 466 U.S. at 655-656. However, the court also noted that "if the process loses character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 456-457.

Similarly, this Court noted in *Strickland* v. *Washington*, 466 U.S. 668 (1984) that a fair trial is one in which

evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. *Id.* at 685. The sixth amendment relies on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the amendment envisions. *Id.* at 688. This Court described the role or function of counsel as an assistant to the defendant, from which derives "the overarching duty to advocate the defendant's cause," consult with the client and keep the client informed. *Id.* Moreover, counsel also has a duty to bear such skill and knowledge as will render the trial "a reliable adversarial testing process." *Id.*

The Court was describing the role of counsel in setting forth standards for evaluating ineffective assistance of counsel claims. The court clarified that in making the determination of whether counsel's acts or omissions were outside the range of professionally competent assistance, ". . . the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* at 690. *Accord, Kimmelman* v. *Morrison*, 477 U.S. ____, 91 L.Ed.2d 305, 325-326 (1986).

Accordingly, this Court has repeatedly issued decisions which protect an appeal as of right and provide adequate and effective counsel on behalf of the defendant. For example, in *Evitts* v. *Lucey,* 469 U.S. 387 (1985), this Court held that a first appeal as of right is not adjudicated in accord with due process of law if the appellant does not have the effective assistance of an attorney. *Id.* at 396. The court noted that to prosecute an appeal, a criminal appellant must also face an adversary process that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. *Id.* The court added that

nominal representation on an appeal as of right—like nominal representation at trial—does not suffice to render the proceedings constitutionally adequate. *Id.* A "party whose counsel is unable to provide effective representation is in no better position than one who has no counsel at all." *Id.* The court affirmed the issuance of a writ of habeas corpus where counsel failed to file the statement of appeal as required by Kentucky law. *Id.* at 389-391.

Similarly, this Court has rejected a Missouri procedure where trial counsel would file a motion for new trial which specifically designated issues to be considered on direct appeal, as well as a notice of appeal, and then move to withdraw. *Swenson* v. *Bosler*, 386 U.S. 258, 259 (1967). Under that procedure, the Supreme Court of Missouri would require preparation of the transcript for the appeal and then independently review the issues presented by counsel's motion on the basis of *pro se* briefs or no briefs at all. *Id.* The court noted that the assistance of appellate counsel in preparing and submitting a brief which defines legal principles upon which claims of error are based and which designates and interprets the relevant portions of the trial transcript may be of substantial benefit to the defendant, and that the failure to provide such violated the fourteenth amendment. *Id.*

This Court has also rejected the "clerk's transcript procedure" where an attorney, believing an appeal to be without merit, failed to provide the court with a complete record of the trial, and instead provided the court with the information and indictment, grand jury minutes, bailiff's oath, statement and instructions, and various orders and judgment entries. *Entsminger* v. *Iowa*, 386 U.S. 748, 749-752 (1967). The court again reiterated that appointed

counsel must function in the active role of an advocate, as opposed to that of an *amicus curiae*. *Id.* at 751.

The court has also ruled that appointed counsel must be provided with a copy of the court transcript in investigating the appeal. *Hardy* v. *United States*, 375 U.S. 277, 281 (1964). *Compare Lane* v. *Brown*, 372 U.S. 477 (1963) and *Eskridge* v. *Washington State Board of Prison Terms & Paroles*, 357 U.S. 214 (1958).

Indeed, one prior decision of this Court has already rejected a discussion requirement similar to the one used in Wisconsin. In *Ellis* v. *United States*, 249 F. 2d 478, 101 U.S. App. D.C. 386 (D.C. Cir. 1957), the United States Court of Appeals appointed counsel to represent appellant while requiring counsel to advise the court whether it was impossible to determine without a transcript if the appeal was frivolous or taken for delay. *Id.* at 478. Counsel presented the court with a memorandum containing a detailed statement of facts, a possible area of error, and reasons why there was not such merit as to warrant further prosecution of the appeal. *Id.* at 478-479. The Court of Appeals noted that two lawyers who reviewed the case pursued their task with diligence and performed their function of representing the appellant and advising the court. *Id.* at 479. The Court then denied the petition for leave to appeal. *Id.*

This Court reversed the decision of the Court of Appeals in *Ellis* v. *United States*, 356 U.S. 674 (1958). This Court concluded that the two attorneys appointed by the Court of Appeals performed essentially the role of *amici curiae*. *Id.* at 675. The court held that representation in the role of advocate is required. *Id.* While counsel may move to withdraw if the appeal is frivolous, the discussion requirement was rejected, and the case was

remanded because one of the issues could not be characterized as frivolous. *Id.*

The importance of *Ellis* cannot be ignored, as it was relied upon by this Court in *Anders*. 386 U.S. at 741-742. While the court clearly requires conscientious investigation by counsel, with counsel providing it with issues that might arguably support the appeal, this Court made it clear that it was for the court, not counsel, to decide whether the case is wholly frivolous. 386 U.S. at 744. Notably absent from the decision in *Anders* is the discussion requirement rejected in *Ellis*. Since *Anders* carefully set forth a procedure to be followed in no merit cases, the absence of the discussion requirement in *Anders* coupled with the decision in *Ellis* make it clear that counsel is not to perform the function of advising the court why the case lacks merit.

The Wisconsin Supreme Court in the instant action recognized that the procedure in Wisconsin under Wis. Rule § 809.32(1) ". . . goes beyond *Anders* and requires that the attorney file a brief which, in addition to articulating anything in the record which might support an appeal, includes a statement indicating why the appeal lacks merit." *State of Wisconsin ex rel. McCoy* v. *Wisconsin Court of Appeals, District I*, 137 Wis. 2d 90, 95, 403 N.W.2d 449 (1987). Nevertheless, the court concluded that while *Anders* does not sanction the use of the discussion requirement, it does not proscribe it, either. *Id.*, 137 Wis. 2d at 97.

The court in *McCoy* interpreted the discussion rule to require a statement of reasons why the appeal lacks merit, which might include a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the

record which might compel reaching that same result. *Id.*, 137 Wis. 2d at 100. The court viewed the rule as an attempt to provide the court with "notice" that there are facts on record or cases or statutes on point which would seem to compel a conclusion of no merit. *Id.* The court reasoned that the rule requires an attorney to fulfill a duty that co-exists with the duty owed to the client—that duty which is owed to the court. *Id.* The court noted that the discussion requirement serves as a significant administrative aid to the reviewing court. *Id.*, 137 Wis. 2d at 103. The "discussion requirement operates as a judicial aid, serves an information function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner." *Id.*

The problem with the court's reasoning in *McCoy* is that it is contrary to the "very premise of the adversary system of criminal justice" that partisan advocacy on both sides of the case will best promote the ultimate objective of convicting the guilty and freeing the innocent. *United States* v. *Cronic*, *supra*, 466 U.S. at 655. Under the Wisconsin no merit procedure, ". . . the process loses character as a confrontation between adversaries . . ." *Id.* at 466-467. Counsel would no longer be serving the function of an assistant to the client with an "overarching duty to advocate the defendant's cause" while subjecting the appeal to the adversarial testing process which the sixth amendment envisions. *Strickland* v. *Washington*, *supra*, 466 U.S. at 685, 688, 690. Instead, counsel would be serving as an administrative aid to the reviewing court while fulfilling a duty owed not to the client, but to the court. *McCoy*, 137 Wis. 2d at 100, 103. This, of course, counsel cannot do. *Ellis* v. *United States*, 356 U.S. at 675; *Anders*, 386 U.S. at 744-745.

Appellant would note that one circuit of the United States Court of Appeals recently ruled that a criminal

defendant was denied effective assistance of counsel when his appellate lawyer did essentially what the Wisconsin Supreme Court has required in *McCoy*. In *Robinson* v. *Black*, 812 F.2d 1084 (8th Cir. 1987), the court concluded that "counsel did not act as an advocate when he briefed all issues in favor of the government and concluded Robinson's claims were meritless. Robinson had a right to expect counsel to brief and argue his case to the best of counsel's ability showing the most favorable side of defendant's arguments. Counsel changed the adversarial process into an inquisitorial one by joining the forces of the state and working against his client." *Id.* at 1086-1087. Excerpts from the no merit brief in that case make it clear that counsel identified issues that might arguably support the appeal and then provided reasons why the issues lacked merit. *Id.* at 1086, n. 7. Yet the Eight Circuit concluded that the assistance afforded to Robinson on direct appeal violated the sixth amendment. *Id.* at 1087.

Similarly, another circuit of the United States Court of Appeals has concluded that the constitution is violated when counsel for an appeal as of right adds the weight of his opinion to the position of his client's adversary. *Harders* v. *State of California*, 373 F. 2d 839, 843 (9th Cir. 1967). In *Harders*, the attorney appointed to conduct the appeal was relieved of further responsibility after reporting to the court that he believed there was no merit to the appeal. *Id.* at 842. The Ninth Circuit reasoned that the traditional duty of an advocate is to uphold the contentions of his client, and that counsel should not voluntarily undermine them. *Id.* The order dismissing the appeal was vacated. *Id.* at 843. *Accord*, *Smith* v. *United States*, 384 F. 2d 649, 650 (8th Cir. 1967) ("The cause of advocacy is not served to read a brief filed by appellant's own counsel asserting the government's position in the case.").

And notably, this Court has vacated another decision of the United States Court of Appeals for the Second Circuit and remanded the matter for reconsideration in light of *Anders* where counsel petitioned to withdraw after providing the court with an affidavit summarizing the evidence, a possible issue and a conclusion that the only possible legal issue was without any basis. *Camodeo* v. *United States*, 387 U.S. 575 (1967), *vacating United States* v. *Camodeo*, 367 F. 2d 146 (2nd Cir. 1966).

In addition, the United States Court of Appeals for the Eleventh Circuit recently held that

> [i]f the *Anders* procedure is to work, therefore, the lawyer filing the *Anders* brief must, to the extent possible, remain in his role as advocate; at this stage of proceeding it is not for the lawyer to act as an unbiased judge of the merit of particular grounds for appeal. He or she is required to set out *any* irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another counselor or the court, be arguably meritorious. This is done in order that those potential claims not be overlooked. The objective of these potential claims is for the court's determination, not the advocate's.

United States v. *Blackwell*, 767 F.2d 1486, 1487-88 (11th Cir. 1985). In *Blackwell*, the court denied counsel's motion to withdraw on the basis that the appeal was frivolous where counsel filed a brief in support of the motion with eight pages of excerpts from testimony, and concluded that he was unable to find anything which might arguably support an appeal. *Id.* at 1488.

Appellant notes that other jurisdictions have adopted procedures which preclude the discussion requirement as envisioned in *McCoy*. For example, the West Virginia

Supreme Court has indicated that it is not appellate counsel's prerogative to determine finally the merits of the appeal. The court, not counsel, must decide if the appeal is wholly frivolous. *Turner* v. *Haynes*, 245 S.E.2d 629, 630 (W. Va. 1978) and *Rhodes* v. *Leverette, Warden*, 239 S.E.2d 136, 139-140 (W. Va. 1977). While the discussion requirement was not at issue in those cases, the court made it clear that ". . . appointed counsel support his client's appeal to the best of his ability." *Id.* at 139.

In *People* v. *Feggans*, 67 Cal. 2d 444, 62 Cal. Rptr, 419, 432 P. 2d 21 (1967), the Supreme Court of California criticized the brief filed by the original appellate counsel, noting that after raising seven points in a no merit letter to the court, counsel sought to show the court that the case had no merit. *Id.*, 432 P.2d at 23. The court was likewise critical of the fact that counsel did not set forth relevant facts, cited no applicable authorities, and argued the case against the client. *Id.*, 432 P. 2d at 23-24. The court concluded that such representation did not constitute the assistance of counsel required by *Anders*. *Id.*, 432 P. 2d at 24.

The Supreme Courts of Utah and Arizona have also strictly adhered to the procedure described in *Anders* without requiring a discussion of why the case lacks merit. *State of Utah* v. *Clayton*, 639 P.2d 168, 169-171 (Utah 1981); *State of Utah* v. *Varner*, 692 P.2d 753, 754 (Utah 1984); and *State of Arizona* v. *Leon*, 451 P.2d 878, 880 (Ariz. 1969). *See also State of Ohio* v. *Duncan*, 385 N.E.2d 323, 57 Ohio App. 2d 93, 11 O.O.3d 83 (Ohio App. 1978).

In New Jersey, the Superior Court held that a defendant was deprived of his right to effective assistance of trial counsel because he was not advised of his right to appeal

and the right to counsel to prosecute the appeal. *State of New Jersey* v. *Allen*, 239 A.2d 675, 679, 99 N.J. Super. 314 (1968). In reaching its decision, the court described the procedures to be followed when a defendant exercises his right to appeal. The court stated that "[o]nce a defendant exercises his right to appeal, his appellate counsel must be an advocate; he does not decide whether the claim will be successful as argued by the state. . . . That task is for the courts." *Id.* The court then adopted the procedure set forth in *Anders*. *Id.*

And in Florida, the appellate court, in striking as inadequate a purported *Anders* brief, adopted a procedure almost identical to the one employed by appellate counsel in the instant case. In *Smith* v. *State of Florida*, 496 So. 2d 971 (Fla. Dist. Ct. App. 1986), the court ruled that a statement of judicial acts to be reviewed without addressing each issue separately and indicating how and where each arose in the record was inadequate. *Id.* at 974. The procedure to be followed instead was for appellate counsel to specify where the judicial act arose in the record, what transpired, the lower court's ruling, the apparent basis for the trial counsel's objection and basis for suggesting it was error. *Id.* "Counsel should then present such argument as can reasonably be made in support of the defendant's position on each designated act, with appropriate citation to the record and pertinent authority, if any." *Id.* Defendant's brief should state that such designations present wholly frivolous issues. *Id.* While counsel should not make a wholly frivolous argument, he should not brief the case against the client either. *Id.* The state can then file an answer brief indicating the lack of merit to the case. *Id.*

Appellant recognizes that all jurisdictions which have considered the question of what is required of appellate counsel in an *Anders* situation are not in agreement.

Nevertheless, many which have not adopted the position proposed by appellant have still fashioned remedies which would not require counsel to set forth reasons why the action lacks merit or brief the case against the client.[1] Some courts have advanced the requirement of filing frivolous briefs with the court, completely disavowing the *Anders* procedure. *Huguley* v. *State*, 253 Ga. 709, 324 S.E.2d 729 (1985). *Compare*, *State* v. *McKenney*, 98 Idaho 551, 568 P.2d 1213 (1977). Another court has modified the *Anders* approach, suggesting that the attorney should not seek to withdraw, but advance the weak or frivolous issues on behalf of the client under the theory that the court must deal with those issues in any event. *State* v. *Gates*, 466 S.W.2d 681, 684 (Mo. 1971).[2]

Other jurisdictions have determined that the court should appoint another attorney altogether when appellate counsel has determined that the appeal lacks merit in an effort to protect the defendant's right to appeal. In *State* v. *Lewis*, 291 N.W.2d 735 (N.D. 1980), the North Dakota Supreme Court distinguished *Anders* because California law does not provide for an appeal as a matter of right, while North Dakota law does. *Id.* at 737. Thus, the need for an *Anders* proceeding was eliminated. *Id.* Instead, the proper procedure when court-appointed defense counsel believes the "appeal is without merit is to appoint another attorney to represent the defendant on

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[1] *But see*, *United States* v. *Edwards*, 780 F.2d 712, 715 (7th Cir. 1986); *Nickols* v. *Gagnon*, 454 F. 2d 467, 469 (7th Cir. 1971); *People* v. *Lowery*, 445 N.Y.S. 992 (1982); *Caraway* v. *State*, 560 S.W.2d 690 (Tex. Cr. App. 1978); and *Commonwealth* v. *McClendon*, 434 A.2d 1185, 1187-88 (Pa. 1981), which reject appellant's position that it is improper to inform the court why the case lacks merit.

[2] The Wisconsin Supreme Court has adopted a rule prohibiting the filing of frivolous briefs. Wis. Rule § 809.25(3).

appeal as soon after the initially appointed attorney makes his opinion as to frivolity known to the court as is practical." *Id.* The court no longer hears any proceedings designed to determine whether or not an appeal is frivolous. *Id.* And in Alabama, the court still requires the filing of an *Anders* brief, but after permitting counsel to withdraw, new counsel is appointed. *Ex Parte Sturdivant*, 460 So. 2d 1210 (Ala. 1984), *on remand*, 460 So. 2d 1213 (Ala. 1984) *cert. denied*, 470 U.S. 1027 (1985).

The State of Oregon has fashioned yet another approach which is designed to keep counsel from providing reasons why issues lack merit. In *State* v. *Horine*, 669 P.2d 797 (1983), *cert. dismissed*, 466 U.S. 934 (1984), the Court of Appeals agreed that it is not the function of counsel to decide the merits of the appeal. *Id.* at 805. However, the court also stated that the right to counsel does not require counsel to present frivolous issues. *Id.* As a result, the court concluded that when appellate counsel determines that the case lacks merit, counsel should notify the court and the appellant, and the appellant is allowed to raise whatever issues he or she chooses to raise. *Id.* at 806. "Aside from the opportunity to present issues *pro se*, the appellant is not entitled to further protection at state expense." *Id.* The court will not search the record for error anymore than it does in regular appeals. *Id.*

The states of Idaho and Massachusetts have both created new procedures on appeal under state law where counsel is no longer permitted to withdraw as counsel on the basis of *Anders* because it would prejudice the client's appeal. *State* v. *McKenney*, 98 Idaho 551, 568 P.2d 1213, 1214-15 (1977); *Commonwealth* v. *Moffett*, 418 N.W.2d 585, 591-92 (Mass. 1981). Counsel must refrain from arguing against the client's claim in the brief. *Id.* While both

courts felt that providing reasons why an appeal lacked merit might comply with *Anders*, those reasons would no longer be accepted in those states. *Id.*

Other jurisdictions which do not appear to require counsel to provide reasons why an appeal lacks merit include Wyoming, Tennessee and Delaware. *Eaton* v. *State*, 660 P.2d 803, 805, n. 3 (Wyo. 1983); *State* v. *Henderson*, 425 S.W.2d 593, 596 (Tenn. 1968); and *Smith* v. *State*, 248 A.2d 146, 147 (Del. 1968).

The Wisconsin Supreme Court relied upon the decision of *Nickols* v. *Gagnon*, 454 F. 2d 467 (7th Cir. 1971) in reaching its decision. *McCoy*, 137 Wis. 2d at 97-98 (J.A. 114-115). In *Nickols*, the attorney appointed to prosecute the appeal did not prepare on advocate's brief on behalf of the client, but instead prepared a detailed letter identifying issues and demonstrating the absence of merit. *Id.* at 468-469. The United States Court of Appeals, instead of following *Anders*, opined that *Anders* has been interpreted as requiring a request to withdraw to "be accompanied by a brief arguing anything in the record that might support appeal." *Id.* at 470. The specific quotation from *Anders* states that request to withdraw "must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal." *Anders*, 386 U.S. at 744. Thus, the Court of Appeals erred in viewing the "interpretation" as attaching paramount importance to the form, rather than the substance, of a lawyer's representation. *Nickols*, 454 F. 2d at 470. There was no loose interpretation of *Anders*, as this court clearly created the requirement of what was to be filed. *Nickols* is therefore inconsistent with *Anders*. *See e.g.*, Pengilly *Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal*, 9 Crim. Jus. J. 45, 55-56 (1986).

Moreover, the fear expressed in *Nickols* that a subtle but invidious distinction between appointed and retained counsel might develop is without substance, as counsel, when filing an *Anders* brief, is allowed to move to withdraw after advising the court that the case is wholly frivolous. *Anders*, *supra*. By "flagging" the case in this fashion, no distinction will be created.

Appellant submits that the requirement of Wis. Rule § 809.32(1) that he provide reasons why the appeal lacks merit is directly contrary to *Anders* and would deprive Mr. McCoy of his right to appeal, due process on appeal, and effective assistance of appellate counsel. Counsel must act as an advocate in order to protect those rights. Counsel cannot do that by acting as a friend of the court or briefing the case against the client. The state is ably represented by its own attorneys and has been served with a copy of the brief, and can indicate in its brief why the case lacks merit, should the court require one. Counsel, however, should not deliberately violate his client's sixth and fourteenth amendment rights by being less than an advocate.

Mr. McCoy wants to have his appeal heard on the merits. Under *Anders*, *Strickland* and *Ellis*, counsel must assist him in that endeavor. While counsel cannot present frivolous claims to the court without first identifying that the *Anders* procedure is being used, counsel is nevertheless required to protect the appeal, even though counsel questions its merit. Thus, counsel cannot, as appellant's *assistant*, tell the court why the case lacks merit. To do so would simply not protect McCoy's rights to appeal and to effective assistance of counsel.

In the instant case, counsel has done no more nor less than strictly apply *Anders* to the facts of this case. After

determining that the appeal was frivolous the court was so advised and permission to withdraw was requested (J.A. 14, 27). 386 U.S. at 744. A brief referring to anything in the record that might arguably support the appeal was provided with the request (J.A. 11-27). 386 U.S. at 744. A copy was furnished to the appellant (J.A. 28). 386 U.S. at 744. The Court provide Mr. McCoy with thirty (30) days to file any response he wished the court to consider (J.A. 28). 386 U.S. at 744. Now the court, not counsel, must fully examine the record to decide whether the case is wholly frivolous. 386 U.S. at 744. *Anders* simply requires no more, and counsel is in full compliance.

Appellant submits that the *Anders* procedure should not be modified so that counsel is placed in the position of either acting as *amicus curiae* or briefing the case against his client. Since *Anders* specifically rejects that approach, *Id.*, Wis. Rule § 809.32(1) is in violation of the sixth and fourteenth amendments insofar as it requires reasons why the case lacks merit. Thus, this court should so find and reaffirm the procedure outlined in *Anders*.

Appellant recognizes that counsel is required to advise the defendant why his or her case lacks merit as part of the process in determining whether a no merit report should be filed. That information, however, should be provided to the client, not the court. Surely, appellee would not suggest that discussions of tactics at trial with the defendant should be disclosed to the court. Similarly, the court should not be made privy to discussions of tactics on appeal. Once counsel determines that a case is frivolous and without arguable merit, the client should be advised so that the client can make an informed decision as to how to proceed. An evaluation of the case should be presented to the client, who can then decide whether to proceed *pro se*, whether to waive the appeal, or whether

to require a no merit report. Once the client makes that decision, the case can then proceed, and if a no merit report is requested, the procedure under *Anders* should govern. Any discussion of why the case lacks merit should not be made to the court, however, as counsel does not represent the court and is not supposed to act as an *amicus*.

This Court has recognized that a criminal appellant must face an adversary process that—like a trial—is governed by intricate rules that to a layperson would be hopelessly forbidding. *Evitts* v. *Lucey*, 469 U.S. at 396. If nominal representation on an appeal is not sufficient to render the proceedings constitutionally adequate, *Id.*, then Wisconsin Rule § 809.32(1) is surely unconstitutional, for it merely supplies nominal representation. Under that rule, the client loses the services of a partisan advocate in favor of an attorney concerned with a duty owed to the court. Mr. McCoy is entitled to receive better than that.

As Wisconsin law provides that Mr. McCoy be provided an appeal as a matter of right with publicly compensated counsel for that appeal, he is entitled to receive due process and effective assistance of counsel. The Wisconsin no merit rule, insofar as it requires a discussion of why any issues lack merit, fails to provide him with that. Therefore, appellant respectfully requests that this court reverse the Wisconsin Supreme Court with directions that the No Merit brief filed on behalf of Mr. McCoy in his appeal (J.A. 11-27) be accepted as constitutionally adequate.

CONCLUSION

In light of the foregoing, appellant respectfully requests that this Court reverse the Wisconsin Supreme Court and hold that Wis. Rule § 809.32(1) is unconstitutional, and remand the matter with directions to prohibit the Wisconsin Court of Appeals, District I, from striking the brief filed on behalf of Mr. McCoy in his appeal and from requiring counsel to inform the court why the issues lack merit.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant Wisconsin Public Defender
819 North Sixth Street, Room 821
Milwaukee, Wisconsin 53203
(414) 227-4891
Counsel for Appellant.

Supreme Court, U.S.
FILED
DEC 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5002

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1987

STATE OF WISCONSIN, ex rel.
ELLIS T. McCOY,
Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF WISCONSIN

BRIEF OF APPELLEE

DONALD J. HANAWAY
Attorney General
State of Wisconsin

STEPHEN W. KLEINMAIER
Assistant Attorney General

Attorneys for Appellee

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

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No. 87-5002

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SUPREME COURT OF THE UNITED STATES

October Term 1987

STATE OF WISCONSIN, ex rel.
ELLIS T. McCOY,
Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,
Appellee.

BRIEF OF APPELLEE

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions cited in the Brief of Appellant, the following provisions are cited in the Brief of Appellee:

> A lawyer should represent a client zealously within the bounds of the law
>
> (1) Ethical consideration.
>
> . . .

. . . .

(c) Where the bounds of law are uncertain, the action of a lawyer may depend on whether he or she is serving as advocate or advisor. A lawyer may serve simultaneously as both advocate and adviser, but the 2 roles are essentially different. In asserting a position on behalf of his or her client an advocate for the most part deals with past conduct and must take the facts as he or she finds them. By contrast, a lawyer serving as adviser primarily assists his or her client in determining the course of future conduct and relationships. While serving as advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. In serving a client as adviser a lawyer in appropriate circumstances should give his or her professional opinion as to what the ultimate decisions of the court would likely be as to the applicable law.

SCR 20.34 (repealed, effective January 1, 1988).

Representing a client within the bounds of the law

(1) In his or her representation of a client, a lawyer may not:

. . . .

(b) Knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

SCR 20.36 (repealed, effective January 1, 1988).

Meritorious Claims and Contentions

Text of rule eff. Jan. 1, 1988

(a) In representing a client, a lawyer shall not:

(1) knowingly advance a claim or defense that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.

SCR 20:3.1.

SUMMARY OF ARGUMENT

The discussion requirement of Wisconsin Rule 809.32(1) is not in violation of Anders v. California, 386 U.S. 739 (1967), and it does not violate McCoy's constitutional rights. An attorney satisfies his obligation to be an advocate for a defendant when in examining the record and the law he resolves in favor of his client all doubt on whether an issue is frivolous. In satisfying the discussion requirement, the attorney is not acting as amicus curiae. The discussion requirement promotes the purposes of the no merit procedure outlined in Anders by assisting the defendant in it assurance that his attorney is giving effective representation and by assisting the court in its disposition of what is purported to be a frivolous matter. Because

Wisconsin's rule does not conflict with Anders and it does not violate a defendant's constitutional rights, it should be found valid even though other states may have adopted other acceptable procedures for handling no merit cases.

ARGUMENT

WISCONSIN RULE 809.32(1) IS CONSISTENT WITH THE REQUIREMENTS SET FORT IN ANDERS, AND IT DOES NOT DEPRIVE MR. McCOY OF HIS RIGHTS TO APPEAL, TO DUE PROCESS ON APPEAL OR TO EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL INSOFAR AS IT REQUIRES APPELLATE COUNSEL TO PROVIDE THE COURT WITH REASONS WHY A "NO MERIT" APPEAL LACKS MERIT.

Ellis T. McCoy, appellant, contends that the discussion requirement in Wisconsin Rule 809.32(1) is contrary to Anders and Ellis v. United States, 356 U.S. 674 (1958) because it requires his appointed attorney to act as amicus curiae rather than as an advocate on his

behalf. As a result, he concludes that by following the rule his counsel would effectively deprive him of his right to an appeal, to due process on appeal and to effective assistance of counsel.

Anders, 386 U.S at 744, provides that if an appointed appellate counsel "finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw." The request, however, must "be accompanied by a brief referring to anything in the record that might arguably support the appeal." Id.

Anders demands that in performing these tasks, the appellate attorney act "in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." Id. In the role of the advocate, the appointed attorney

should not brief his case against his client. Anders, 386 U.S. at 745.

The procedure explained in Anders assists the attorney's client by requiring that his attorney conduct a conscientious examination of the case and prepare a brief that refers to the record and legal authorities. Anders, 386 U.S. at 744-45. In protecting the attorney from charges that he was ineffective, Anders, 386 U.S. at 745, the procedure also assures that the attorney has provided effective representation to his client.

The procedure assists the court in carrying out its function of deciding whether the appeal is frivolous by requiring a brief that furnishes the court with ready references to the record and the legal authorities relied upon by counsel. Anders, 386 U.S. at 744-45.

Because the discussion requirement in Wisconsin Rule 809.32(1) permits the appointed attorney to act as an advocate on behalf of his client while assisting his client and the court, the rule is consistent with Anders and does not deprive McCoy or other indigent clients of their constitutional rights.

A. The appointed attorney acts as an advocate in behalf of his client when satisfying the discussion requirement and the other provisions of Wisconsin Rule 809.32(1).

McCoy argues that when his attorney discusses why the issues in the brief lack merit, in compliance with Wisconsin Rule 809.32(1), his attorney is acting as an amicus curiae rather than as an advocate on his behalf.

McCoy is wrong. An attorney can fulfill his obligation to be an advocate

for his client while complying with the discussion requirement of the rule.

"The obligations owed by the attorney to the client are defined by the professional codes . . . ." Polk County v. Dodson, 454 U.S. 312, 327 (1981) (Burger, Chief Justice, concurring). The Code of Professional Responsibility applicable to McCoy's attorney in Wisconsin when the no merit brief was filed required the attorney to represent his client zealously within the bounds of the law. SCR 20.34. When the bounds of the law are uncertain "the action of the lawyer may depend on whether he or she is serving as advocate or adviser." SCR 20.34(1)(c).

> While serving as advocate, a lawyer should resolve in favor of his or her client doubts as to the bounds of the law. In serving a client as adviser, a lawyer in appropriate circumstances should give his or her professional opinion as

> to what the ultimate decisions of the courts would likely be as to the applicable law.

SCR 20.34(1)(c).

The advocate differs from an adviser in SCR 20.34(1)(c) in the same way that an advocate differs from amicus curiae because an amicus has the function of advising in order that justice may be done rather than advocating a point of view so that a cause may be won by one party or another. See Leigh v. Engle, 535 F. Supp. 418, 420 (N.D. Ill. E.D. 1982) and Allen v. County School Board of Prince Edward County, 28 F.R.D. 358, 362 n.2 (E.D. Va. 1961).

In the context of the no merit report filed under Wisconsin Rule 809.32(1), the appointed attorney acts as an advocate in reviewing the record and legal authorities and resolving all doubts in favor of his client on the

question of whether an issue is frivolous. As explained in Com. v. McClendon, 495 Pa. 467, 434 A.2d 1185, 1188 (1981):

> The role of an advocate, insisted upon in Anders, refers to the manner in which the record was examined in an effort to uncover grounds to support the appeal. Where counsel has in good faith satisfied that obligation and found the appeal to be wholly frivolous, he can do no more.
>
> When counsel has concluded that the appeal is frivolous after resolving all doubts in favor of his client, the advocacy role has ended because his ethical obligations prohibit him from advancing such a claim. In Wisconsin, SCR 20.36(1)(b) prohibits a lawyer from knowingly advancing "a claim . . . that is unwarranted under existing law, except that the lawyer may advance such claim or defense if it can be supported by good faith argument for an extension,

modification or reversal of existing law."*

This court recognized that ethical requirements limit the role of the advocate when in Dodson, 454 U.S. at 323, it said:

> Although a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy. It is the obligation of any lawyer--whether privately retained or publicly appointed--not to clog the courts with frivolous motions or appeals.

(Footnote omitted.)

The attorney has, therefore, reached the limits of permissible advocacy once he concludes after conscientious

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*This is the wording in SCR 20.36(1)(b) as applicable when the no merit report was filed and when this brief was filed. As of January 1, 1988, the rule was repealed and recreated as SCR 20:3.1, which carries the same prohibition.

investigation that the appeal is frivolous. The attorney does not violate his role as an advocate when he thereafter in his brief explains to the court the reasons for his conclusion. In providing such an explanation, the attorney is not arguing against his client or acting as amicus curiae. The Wisconsin Supreme Court noted that the reviewing court "can distinguish between being informed by the one [i.e., an evaluation] and being convinced by the other [i.e., an argument against the client]." Cleghorn v. State, 55 Wis. 2d 466, 475, 198 N.W.2d 577 (1972). In this case, itself, the Wisconsin Supreme Court explained:

> We do not contemplate the discussion rule to require an attorney to engage in a protracted argument in favor of the conclusion reached; rather, we view the rule as an attempt to provide the court with "notice" that there are facts

> on record or cases or statutes on point which would seem to compel a conclusion of no merit. Thus, we do not believe the rule requires an attorney to argue against the client . . . .

St. ex rel. McCoy v. Appeals Ct., 137 Wis. 2d 90, 100, 403 N.W.2d 449 (1987).

Whereas the advocate in reviewing the record and the law resolves all doubt in favor of his client, the amicus would conduct a detached evaluation and assess the issues by the test of how the appellate court would likely decide them rather than whether the issues had any arguable merit. See Evitts v. Lucey, 469 U.S. 387, 394 (1985); Robinson v. Black, 812 F.2d 1084, 1086-87 (8th Cir. 1987); and State v. Allen, 99 N.J. Super. 314, 239 A.2d 675, 679 (1968).

Because the attorney fulfills the advocacy obligation and role by resolving all doubts in favor of his client while

reviewing the record and the law, the discussion requirement in Wisconsin Rule 809.32(1) does not infringe upon the attorney's duty to be an advocate for his client; and, therefore, the rule is not inconsistent with Anders and it does not violate McCoy's constitutional rights.

This result has been reached, at least implicitly, in other jurisdictions that have found a discussion requirement as part of the no merit brief to be in compliance with Anders. See Nell v. James, 811 F.2d 100, 104 (2nd Cir. 1987); United States v. Edwards, 777 F.2d 364, 365 (7th Cir. 1985); Nickols v. Gagnon, 454 F.2d 467 (7th Cir. 1971), approving an evaluation of a no merit conclusion in a Wisconsin conviction; Com. v. Moffett, 418 N.E.2d 585, 592 (Mass. 1981); People v. Lowery, 86 A.D.2d 537, 445 N.Y.S.2d 992, 993 (1982); McClendon, 434 A.2d at

1188; and Caraway v. State, 560 S.W.2d 690, 691 (Tex. Crim. App. 1978).

McCoy contends that Anders and Ellis prohibit a discussion requirement. That is not so. Ellis required the attorney to act as advocate for the client. Ellis, 356 U.S. at 675. As explained above, Wisconsin Rule 809.32(1) does not interfere with the attorney's role as advocate. The United States Court of Appeals for the District of Columbia Circuit, in order to implement the holding of Ellis, developed guidelines for appointed attorneys which provided, among other things, that in filing a memorandum that analyzed the cases and cited record references, the attorney should also cite "'any case or cases upon which counsel relied in arriving at his ultimate conclusion.'" Johnson v. United

States, 360 F.2d 844, 845 (D.C. Cir. 1966).

The Court in Anders, after relying on Ellis and requiring attorneys to act as advocates for their clients, invited readers to compare the rules in the District of Columbia to the amicus curiae actions of the attorney who acted improperly in Anders. See Anders, 386 U.S. at 744 n.3 and accompanying text. Although in citing the District of Columbia guidelines this Court said it was not indicating approval of them, surely this Court would have disapproved of them if the discussion requirement in those rules infringed upon the attorney's advocacy obligation. This Court's reference to the guidelines in Anders should at least indicate that the attorney is not acting as amicus when he complies with a discussion requirement.

It is also interesting to note that Anders, himself, approved the discussion requirement in the District of Columbia rules. See Nickols, 454 F.2d at 470 n.7, where Anders is quoted as arguing in his brief that the practice in the District of Columbia Circuit Court of Appeals afforded more adequate protection than he had received because "'[c]ounsel must convince the court that the issues are truly "frivolous."'" In other words, Anders apparently did not see the discussion requirement as an infringement upon his attorney acting as his advocate.

B. The discussion requirement in Wisconsin Rule 809.32(1) helps assure that the attorney is providing his client effective representation.

One of the purposes for which Anders required the attorney to conscientiously examine the case and submit a brief was

to assist his client. Anders, 386 U.S. at 744. The discussion requirement helps achieve that purpose.

As noted in Nickols and by the Wisconsin Supreme Court in this case at McCoy, 137 Wis. 2d at 101, the discussion requirement assures the court that "counsel has 'discharged his obligation to his client in a competent and professional manner.' Nickols, 454 F.2d at 470." The Wisconsin court explained that the attorney's reasoned summary of the law militating against further appellate proceedings provides assurance "that the attorney has made an inquiry into the relative merits of the appeal and that the attorney's withdrawal request is valid and grounded in fact and in the law." McCoy, 137 Wis. 2d at 101.

The discussion requirement also aids the client by providing proof that the

attorney has accurately concluded that the appeal is frivolous. In the process of preparing a written statement explaining the conclusion that the appeal is frivolous, the attorney might change his mind and decide the appeal is meritorious after all. It is not unusual that in forcing one to carefully examine an issue, the task of writing a justification discloses gaps in reasoning that were missed when only thinking of the question. Therefore, the duty of writing the reasons for concluding the appeal is frivolous may uncover a meritorious issue that would have otherwise been missed by the attorney, and perhaps also the court when it satisfied its obligation to decide whether the appeal was, indeed, frivolous.

C. The discussion requirement in Wisconsin Rule 809.32(1) helps assist the court in its role of deciding whether the appeal is frivolous.

In Anders, 386 U.S. at 744, the court noted that the attorney can, without conflict, assist the court as well as his client. By providing a ready reference to the record and citations to legal authorities, the attorney provides assistance to the court.

The discussion requirement provides additional assistance to the court and, therefore, furthers the purposes of the brief required by Anders.

The court, not counsel, has the ultimate responsibility for deciding whether the case is wholly frivolous. Anders, 386 U.S. at 744. The attorney assists the court in performing that function when he explains how he concluded that the appeal was

frivolous. Nickols, 454 F.2d at 470. The Wisconsin Supreme Court in this case recognized that the discussion requirement is beneficial because:

> [T]he court has before it both the arguments in support of an appeal and a statement which at least refers to case authorities or factual references which do not support an appeal. Thus, the court has a substantial base of authority to refer to in making its own, independent evaluation of the case. This makes it less likely that the court will overlook important legal authorities which would either support or militate against continued appellate proceedings. Hence, the discussion requirement operates as a judicial aid, serves an informational function and, equally important, enables the court to operate in a more efficient, expeditious and cost-saving manner.

McCoy, 137 Wis. 2d at 103.

The efficiency of the court is a legitimate factor to consider in the context of this case. A no merit report is being filed because an attorney

believes an appeal is frivolous. Among the reasons that an attorney is prohibited from advancing frivolous issues and cases are that they abuse the legal procedures, Comment to SCR 20:3.1, effective January 1, 1988, and they are a waste of time for the courts, the parties and the attorneys. Therefore, in the interests of efficiency, frivolous matters are prohibited.

Because the attorney files a no merit report in the interest of the efficiency of avoiding a frivolous appeal, the court should be permitted to adopt rules for efficient handling of no merit briefs. The assistance afforded the court by the discussion requirement improves the efficiency of the disposition of the matter. Without the help of the discussion requirement, the court or its staff or representatives of

the state must examine the entire record and evaluate the arguments presented in the brief just as they would in a regular appeal. In that situation the court and the state's attorneys are using the same time and energy to dispose of the no merit report as would be needed to handle a non-frivolous appeal. That is anomalous because the purpose of the no merit report is to short circuit the usual appeal proceedings and, in the interests of efficiency, avoid a frivolous appeal. If the no merit report creates the same or greater work than a regular appeal, then the no merit procedure has failed its purpose. Extra work should not be created when the purpose of avoiding frivolous matters is to reduce the court's workload.

The states should be permitted to implement the most efficient procedure

that does not infringe upon the defendant's constitutional rights. As argued above, the discussion requirement does not prevent the attorney from being an advocate for his client. Therefore, because the discussion requirement improves the efficiency of the court by easing its workload, the requirement should be permitted.

McCoy contends that the discussion requirement prevents his attorney from being his advocate because the attorney is pointing out information that is against his interest. However, even without the discussion requirement, the attorney by asking for permission to withdraw from the case is flagging the case as one that is without merit. No additional harm is done to the defendant when the attorney explains why he has flagged the case as meritless. And, even

if the defendant were somewhat harmed by the discussion requirement, that harm is outweighed by the assistance the discussion provides the court. In most situations, convenience to the court might not be used to balance against an interest of the defendant. In this context it would be appropriate, however, since a significant purpose for using a no merit procedure is efficiency for the courts, parties and attorneys.

The attorney is an officer of the court as well as an advocate for the defendant. Johnson, 360 F.2d at 846 (Burger, concurring). In the role of officer of the court the attorney can explain why the efficiency of the court and other parties would be served by permitting him to withdraw from a frivolous appeal. See McCoy, 137 Wis. 2d at 100. Without providing the

explanation for his conclusion, the attorney is in the position of asking to be relieved from an appeal that is frivolous while at the same time presenting arguments to support a request for relief for the defendant. The discussion requirement provides a vehicle for the attorney to harmonize those inconsistent positions.

McCoy argues at page 19 of his appellant's brief that, under the Wisconsin no merit procedure, the defendant's counsel would no longer be subjecting the appeal to the adversarial process.

That may be so; but that also seems to be the purpose of the no merit procedure. Under that procedure the attorney is permitted to withdraw because the appeal is frivolous and not worthy of being submitted to the adversarial

process. If the purpose of the no merit procedure is to take frivolous appeals out of the adversarial system then there cannot be error when the procedure succeeds in doing so. If the attorney believes the appeal is worthy of the adversarial process, the appeal should be pursued and he should not seek to withdraw from the case under the no merit procedure.

D. The authorities cited by McCoy do not establish that the discussion requirement of Wisconsin Rule 809.32(1) is in violation of Anders or that it violates McCoy's constitutional rights.

None of the cases cited by McCoy establishes that the discussion requirement in Wisconsin Rule 809.32(1) is in violation of Anders or that it violates his constitutional rights. Indeed, none of the cases analyzes a

discussion requirement in the same context as this case, i.e., a case where Anders is accepted as being satisfied in every other respect.

In United States v. Blackwell, 767 F.2d 1486, 1487-88 (11th Cir. 1985); State v. Leon, 451 P.2d 878 (Ariz. 1969); Allen; State v. Duncan, 57 Ohio App. 2d 93, 385 N.E.2d 323 (1978); State v. Varner, 692 P.2d 753 (Utah 1984); and State v. Clayton, 639 P.2d 168 (Utah 1981), the courts did not analyze whether a discussion requirement is valid. Although those cases seem to not require an evaluation by counsel of the reasons for concluding the appeal is frivolous, they also do not state that such a requirement would be in violation of Anders or otherwise unconstitutional.

In Robinson, 812 F.2d at 1085-87; Smith v. United States, 384 F.2d 649, 650 (8th Cir. 1967); and People v. Feggans, 67 Cal.2d 444, 62 Cal. Rptr. 419, 432 P.2d 21 (1967), the courts stated that counsel should not take the side of the government and argue against their clients in the briefs. In those cases, however, the attorneys did not act as advocates, i.e., they did not resolve all doubts on the issues in favor of their clients. The attorneys analyzed the issues in terms of how the court would be likely to decide them. In other words, the attorneys assumed the role of an amicus. It is not known whether the courts would have made the same statements had counsel acted as an advocate.

Even if all these cases are not distinguishable from the instant case, the arguments presented earlier in this brief more convincingly support the finding that the discussion requirement is permissible than these cases support a contrary finding. These cases do not include any analysis of why a discussion requirement would be in violation of Anders. Only the latter three even indicate in any way that such a requirement is impermissible; and in those cases the courts made the statement that counsel must not argue against his client in the context of situations where the counsel acted as amici. In other words, those cases did not find a discussion requirement invalid in a case where the attorney had acted as an advocate in examining the record and the law and in presenting the possible

arguments that could be raised on an appeal.

To the extent that any of these cases or any of the other cases cited by McCoy simply adopt a no merit procedure different from Wisconsin's, the cases are not relevant to this appeal. The states are free to adopt different no merit procedures to implement Anders as long as the procedures do not conflict with Anders or in any other way violate the defendants' constitutional rights. In response to Anders, states have adopted a variety of procedures. See, e.g., State v. Horine, 64 Or. App. 532, 669 P.2d 797, 802-03 (1983) and C. Pengilly, Never Cry Anders: The Ethical Dilemma of Counsel Appointed to Pursue a Frivolous Criminal Appeal, 9 Criminal Justice Journal 45, 52-61 (1986). In this case, the only question is the validity of the Wisconsin

procedure. The existence of other procedures does not reflect either favorably or unfavorably upon the validity of Wisconsin's procedure; and therefore, they should be ignored. The validity of the discussion requirement must stand or fall on its own merits; and, as argued above, the requirement does not conflict with Anders or Ellis and it does not violate McCoy's constitutional rights.

CONCLUSION

For the reasons discussed above, the Wisconsin Court of Appeals, District I, requests this court to affirm the judgment of the Wisconsin Supreme Court.

Respectfully submitted,

DONALD J. HANAWAY
Attorney General
State of Wisconsin

STEPHEN W. KLEINMAIER
Assistant Attorney General

Attorneys for Appellee

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-8908

Supreme Court, U.S.
FILED
JAN 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-5002

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ELLIS T. MCCOY, ETC.,
Appellant,

v.

WISCONSIN COURT OF APPEALS,
DISTRICT I,
Appellee.

On Appeal From The Supreme Court Of Wisconsin

REPLY BRIEF FOR THE APPELLANT

LOUIS B. BUTLER, JR.
Assistant State Public Defender
819 North Sixth Street, Room 821
Milwaukee, WI 53203
(414) 227-4891
Counsel for Appellant

PRESS OF RAM PRINTING, HYATTSVILLE, MD 20781 (301) 864-6662

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ARGUMENT

I. APPELLEE'S ARGUMENT THAT APPOINTED APPELLATE COUNSEL HAS PERFORMED AS AN ADVOCATE WHEN COUNSEL CONCLUDES THAT THE APPEAL IS FRIVOLOUS AND THEN PROVIDES THE COURT WITH REASONS SUPPORTING THAT CONCLUSION ERRONEOUSLY DISTORTS THE ADVERSARIAL TESTING PROCESS.

Appellee erroneously concludes that the appellant's position that the discussion requirement is unconstitutional is contrary to a prior *concurring* opinion of this court. Appellee's brief at p. 9, *citing Polk County* v. *Dodson*, 454 U.S. 312, 327 (1981) *(Burger, C.J. concurring)*. Appellant has no dispute with the decision rendered by the court in *Dodson* or the proposition stated that "it is the obligation of any lawyer . . . not to clog the courts with frivolous motions or appeals." *Id.* at 323. That is precisely why this court created the procedure in *Anders* v. *California*, 386 U.S. 738 (1967), allowing counsel to move to withdraw after notifying the court that the case is frivolous. This court created a way of protecting an appeal as a matter of right while notifying the court that the appeal was frivolous. *Dodson* and *Anders* are in no way inconsistent.

Appellee apparently recognizes that the role of an "advocate" and an "adviser" are different, yet would saddle the appellant with an adviser in that appeal instead of an advocate. *See* Appellee's brief at pp. 9-15. Under appellee's approach, the lawyer should, after concluding that the appeal is frivolous, provide the court with an explanation justifying that conclusion. Appellee's brief at p. 13. That is consistent with an attorney's role as an adviser as provided in Wisconsin S.C.R. 20.34(1)(c) with one major exception. Under S.C.R. 20.34(1)(c), the lawyer should give his or her professional opinion to the

client, not the court. The role of partisan advocacy is not being fulfilled by definition when the attorney is acting as an adviser to the court.

Appellee has missed the most important facet of providing appellate representation in attempting to justify the Wisconsin discussion requirement. In stating that the attorney has reached the limits of permissible advocacy once he concludes after conscientious investigation that the appeal is frivolous,[1] appellee has ignored the fact that the appellant would not have an advocate where he needs it most, in the court of appeals. A leading article on no merit reports in Wisconsin recognizes that under the Wisconsin procedure, once counsel determined that there were no issues of arguable merit, counsel woul l "change hats and become and *amicus curiae*." H.B. Eisenberg, *No Merit Briefs in Wisconsin Supreme Court*, 45 Wis. Bar Bull. No. 2, 28, at p. 29 (April 1972). By adhering to the discussion requirement, appellate counsel would be depriving the client of partisan advocacy in the appeal before the court of appeals. The appeal would become all but meaningless, although the lawyer would have the satisfaction of knowing that he or she fulfilled the ethical obligation of acting as an adviser.

Appellee suggests that under Wisconsin's discussion requirement, appellate counsel would be providing the court with something other than the type of detached evaluation done by an *amicus curiae*. That suggestion states a distinction without a difference. Appellate counsel provides the court with an evaluation of the case inconsistent with the client's interests under the Wisconsin rule. Indeed, as appellee suggests, the assumption is that appellate counsel has resolved all doubts in favor of the

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[1] Appellee's brief at pp. 12-13.

client before reaching a conclusion of frivolousness, so that any reasons provided by the appellate lawyer would carry more weight than those provided by opposing counsel. In other words, the client is put in a position far more damaging to his or her interests than the client would be in if the other party were required to file its own brief. The Wisconsin discussion requirement is therefore contrary to *Anders*, as it requires the attorney to advance positions contrary to the interests of the client in order to arguably assist the court. Moreover, the discussion requirement does not even assist the court, contrary to appellee's assertions. *See* Appellee's brief at pp. 21-28.

II. THE DISCUSSION REQUIREMENT DOES NOT ASSIST THE COURT IN DECIDING WHETHER THE APPEAL IS FRIVOLOUS, BUT INSTEAD RELIEVES THE ATTORNEY GENERAL'S OFFICE OF ITS RESPONSIBILITY TO ACT AS AN ADVOCATE ON BEHALF OF THE STATE OF WISCONSIN.

The Wisconsin Supreme Court in the instant action concluded that the discussion requirement would better equip the court to make a correct decision about the potential merits of the appeal because it would have before it not only the authorities which might favor an appeal, but also the authorities which might militate against it. *State ex rel. McCoy* v. *Wisconsin Court of Appeals, District I*, 137 Wis. 2d 90, 100-101, 403 N.W.2d 449 (1987). This is no doubt true, as this court noted in *United States* v. *Cronic*, 466 U.S. 648, 655 (1984) ["truth . . . is best discovered by powerful statements on both sides of the question."] Nevertheless, this court has not before required both sides of the question to be presented by only one party to an action.

The reality is that the Wisconsin appellate courts do not receive any additional assistance by the discussion

requirement that they would have in any other appeal as a matter of right. In both regular appeals and no merit appeals, the appellate courts must make an independent evaluation of each case on the merits after receiving briefs pointing out both sides of any possible meritorious claims. Therefore, the court does not "operate in a more efficient, expeditious and cost-saving manner." *McCoy*, 137 Wis. 2d at 103.

Similarly, the appointed appellate counsel does not operate in a more efficient, expeditious and cost-saving manner by adhering to the discussion requirement. In both regular appeals and no merit appeals, the attorney must identify possible issues, research the facts and the law, evaluate the merits of the appeal, provide the client with that evaluation, and then brief the appeal on the merits on behalf of the client. Indeed, appointed appellate counsel under the Wisconsin rule must do more work under the no-merit procedure, as counsel must now provide the court with the research and evaluation normally provided by opposing counsel.

Instead, the only agency that benefits from the discussion requirement in Wisconsin is the attorney for the State of Wisconsin, as that attorney no longer has to file the brief on behalf of the State that it would normally file. In many of the appeals in this state, including the appeal on behalf of Mr. McCoy, the attorney for the State is the Department of Justice under the direction of the Wisconsin Attorney General.[2] In other words, the Wisconsin

[2] WISCONSIN STATUTES

165.25 Duties of department of justice. The department of justice shall:

(1) REPRESENT EACH STATE. Except as provided in s. 59.47(7), appear for the state and prosecute or defend all actions and proceedings, civil or criminal, in the court of appeals and the supreme court, in which the state is interested or a party, and attend to and prosecute or defend all civil cases sent or remanded to any circuit court in which the state is a party; and, if requested by the governor or either house of the legislature, appear for and represent the state, any state department, agency, official employe or agent, whether required to appear as a party or witness in any civil or criminal matter, and prosecute or defend in any court or before any officer, any cause or matter, civil or criminal, in which the state or the people of this state may be interested. The radioactive waste review board may request under s. 16.08(7) that the attorney general intervene in federal proceedings. All expenses of the proceedings shall be paid from the appropriation under s. 20.455(1)(d).

59.47 District attorney; duties. The district attorney shall:

. . . .

(7) Upon the request and under the supervision and direction of the attorney general, brief and argue all criminal cases brought by appeal or writ of error or certified from his or her county to the court of appeals or supreme court. The district attorney of the county in which the case was filed shall represent the state in any appeal or other proceeding regarding that case which is decided by a single court of appeals judge, as specified in s. 752.31(3).

Attorney General's Office and the District Attorney's Office are the only agencies that stand to benefit from the discussion requirement. Thus, the underlying rationale for the Wisconsin Supreme Court's decision is invalid, if the State of Wisconsin is required to file its own brief.

Obviously, an attorney cannot act as an active partisan advocate for opposing parties in a pending legal action. To do so would create a glaring conflict of interest. Yet that is precisely what appellee would have appointed counsel do in an appeal. An appellate attorney does not represent the State of Wisconsin in a criminal appeal, and should not be required to do the state's job for it. Since it is true that an appellate court would be best served when it is presented by both sides of the appeal, the most practical approach would be to have appointed appellate counsel serve the

opposing counsel representing the State (as was done in the underlying appeal in this case), and then require opposing counsel to provide the court with reasons why the case lacks merit if the court cannot easily determine why the appeal is frivolous.

Appellant would note that appellee apparently concedes that Wisconsin's no merit procedure fails to subject the appeal to the adversarial process. Appellee's brief at p. 27. That being the case, an appellant whose case is decided under that procedure has less than nominal representation for the appeal, as well as something less than a full appeal on the merits. No attorney should have the duty of providing his or her client with less than that provided for as a matter of right.

III. THE DISCUSSION REQUIREMENT DOES NOT HELP ASSURE THAT THE ATTORNEY IS PROVIDING HIS OR HER CLIENT WITH EFFECTIVE REPRESENTATION.

Appellee suggests that the discussion requirement assures the court that counsel has discharged his obligation to his client in a competent and professional manner. Appellee's brief at pp. 18-20. This is simply not the case.

Counsel in an *Anders* situation establishes that he or she has competently and professionally represented the client by identifying all possible issues that might possibly support the appeal, by providing the court with all relevant facts and legal authority concerning those issues, and then by moving to withdraw on the grounds that the issues are frivolous. If the appellate court, after reviewing the *Anders* brief, can't come to the conclusion that the case is frivolous, then counsel may have been wrong in reaching the conclusion that the case is frivolous. The court can then, having issues already identified, require

opposing counsel to brief the other side, without having appointed counsel performing that function. On the other hand, if the frivolousness of the case is obvious after a review of the no merit brief, then the court can allow counsel to withdraw without further briefing. Under either scenario, the court will have enough information to determine that counsel has discharged his or her obligation in a competent manner, while at the same time protecting the adversarial testing process on appeal.

The Wisconsin Supreme Court Rules provide that ". . . the function of an advocate is to advance or argue the cause of another . . . ." S.C.R. 20.23(2)(h)(1986).[3] The rules further provide that "(n)either his nor her personal interest, the interests of other clients, nor the desires of third persons should be permitted to dilute a lawyer's loyalty to a client." S.C.R. 20.23(1) (1986).[4] And finally, the rules provide that while a criminal defense lawyer has

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[3] S.C.R. 20.23(2) (1986). . .

(h) Occasionally a lawyer is called upon to decide in a particular case whether he or she will be a witness or an advocate. If a lawyer is both counsel and witness, he or she becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his or her own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

[4] S.C.R. 20.23 (1986) **A lawyer should exercise independent professional judgment on behalf of a client.** (1) ETHICAL CONSIDERATION. The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of the client and free of compromising influences and loyalties. Neither his or(sic) her personal interest, the interests of other clients, nor the desires of 3rd persons should be permitted to dilute a lawyer's loyalty to a client.

a duty to advise the client as to the prospects of success on appeal, it is for the client to decide whether an appeal should be taken. S.C.R. 20.34(2)(d) (1986).[5]

Appellate counsel in this case had attempted to provide the client with an appeal on the merits, notwithstanding the fact that counsel has moved to withdraw because the appeal is frivolous. Counsel has faithfully followed the procedures outlined in *Anders* and protected the adversary testing process on behalf of the client. As appellee concedes that the purpose of the Wisconsin no merit procedure is to take frivolous appeals out of the adversarial system,[6] then that procedure interferes with appellant's right to appeal, to due process on appeal and to effective assistance of counsel. Accordingly, this Court should reject the Wisconsin discussion requirement because it violates the Sixth and Fourteenth Amendments to the United States Constitution.

CONCLUSION

In light of the foregoing, appellant respectfully requests that this Court reverse the Wisconsin Supreme

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[5] S.C.F. 20.34(2) (1986)

(d) In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his or her own. But otherwise the authority to make decisions is exclusively that of the client and if made within the framework of the law, such decisions are binding on his or her lawyer. As typical examples in civil cases, it is for the client to decide whether he or she will accept a settlement offer or whether he or she will waive his or her right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his or her client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

[6] Appellee's brief at pp. 27-28.

Court and hold that Wis. Rule § 809.32(1) is unconstitutional, and remand the matter with directions to prohibit the Wisconsin Court of Appeals, District I, from striking the brief filed on behalf of Mr. McCoy in his appeal and from requiring counsel to inform the court why the issues lack merit.

Respectfully submitted,

LOUIS B. BUTLER, JR.
Assistant State Public Defender
819 North Sixth Street, Room 821
Milwaukee, WI 53203
(414) 227-4891
Counsel for Appellant

Supreme Court, U.S.
FILED
NOV 16 1987
JOSEPH F. SPANIOL, JR.
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ELLIS T. MCCOY,

Appellant,

—v.—

WISCONSIN COURT OF APPEALS, DISTRICT I,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF WISCONSIN

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE ACLU OF WISCONSIN AS AMICI CURIAE IN SUPPORT OF APPELLANT

KIM ROBERT FAWCETT
Counsel of Record
NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION
1625 K Street, N.W.
Eighth Floor
Washington, D.C. 20006
(202) 452-0620

Attorneys for Amici Curiae

Of Counsel:

JOHN A. POWELL
STEVEN R. SHAPIRO
LARRY W. YACKLE
American Civil Liberties
Union Foundation
132 West 43rd Street
New York, New York 10036
(212) 944-9800

EDITOR'S NOTE

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No. 87-5002

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

ELLIS T. McCOY,

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vs.

WISCONSIN COURT OF APPEALS, DISTRICT I,

Appellee,

ON APPEAL

FROM THE SUPREME COURT OF WISCONSIN

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND THE ACLU OF WISCONSIN, AS AMICI CURIAE IN SUPPORT OF APPELLANT

INTEREST OF AMICI CURIAE AND SUMMARY OF ARGUMENT

The National Legal Aid and Defender Association (hereinafter NLADA) is a private, non-profit, national membership organization headquartered in Washington, D.C., whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically, the NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases, and 586 defender offices engaged in providing trial and appellate representation to indigents arrested on or convicted of criminal charges. The membership of the NLADA, therefore, comprises most public defender offices and legal services agencies around the nation,

as well assigned counsel plans and private practitioners.

NLADA members and member offices represent indigent appellants in first criminal appeals of right in appellate courts throughout the nation. The NLADA advocates effective assistance of counsel on appeal and is vitally concerned that every indigent appellant receives the same.

The American Civil Liberties Union (hereinafter ACLU) is a nationwide, non-partisan organization of over 250,000 members dedicated to preserving and defending the principles embodied in the Bill of Rights. The ACLU of Wisconsin is one of its affiliates. The ACLU and its affiliates are particularly committed to preserving the right to effective assistance of counsel as required by the

Constitution. The ACLU has been involved in many cases before this Court, as well as in courts throughout the nation, as an advocate for the right to effective assistance of counsel.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amici curiae in support of Appellant.

We believe Wisconsin's "discussion" rule is unconstitutional. It requires counsel to brief the appeal against his client or to act as amicus curiae rather than as a vigorous advocate. We believe vigorous advocacy requires that counsel exercise professional independence and act with undivided loyalty on behalf of the client. We believe the "discussion" rule is inconsistent with "the constitutional requirement of substantial equality and

fair process". Anders v. California, 386 U.S. 738, 744 (1967).

We further believe that appointed counsel may reconcile any perceived conflict between ethical standards and the constitutional obligation of vigorous advocacy by faithfully pursuing the duty to advocate the client's interest in continuing his or her appeal to final submission on full briefs and oral argument. In our view, this is consistent with counsel's professional obligation to make a suggestion that the reviewing court make a finding regarding frivolity. It is vitally important to both client and counsel that the suggestion of frivolity be resolved. If the appeal is not clearly frivolous, counsel may proceed undeterred by fear of sanctions that might otherwise be imposed should the appeal be actually

frivolous and the suggestion of frivolity not be made. Clarifying the issue of apparent frivolity, then, more nearly enhances than impairs counsel's ultimate ability to be effective on appeal, as required by the Constitution.

This case poses a fundamental question regarding the advocacy required when counsel suggests an appeal is frivolous. That is, whether a state procedural rule compelling counsel to discuss the demerits of his client's appeal is consistent with the Constitution. Amici respectfully argue that it is not, and that Wisconsin's "discussion" rule is unconstitutional.

STATEMENT OF THE CASE

On December 2, 1983, Appellant Ellis T. McCoy was convicted on two felony counts in Milwaukee County Circuit Court. He appealed of right. His court-appointed counsel, Louis B. Butler Jr., began preparation of the appeal with a view toward filing an advocate's brief in the Wisconsin Court of Appeals, District I.[1/] After doing research in preparation for filing that brief, Butler "concluded that further appellate proceedings on behalf of Mr. McCoy would be frivolous and without any arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967) and Rule 809.32(1)." See Jurisdictional Statement, at 7.

1/ The appeal being denominated State v. Ellis T. McCoy, No. 84-929-CR-NM.

Butler then faced Wisconsin Rule 809.32(1) Stats. (1983-84), requiring that he "file with the court of appeals . . . a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit."[2/] He discussed the matter twice by telephone with Mr. McCoy and presented McCoy with three options: voluntary dismissal, proceeding pro se, or

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2/ 809.32 (1983-84) Rule (No merit reports) (1) If an attorney appointed under s. 809.30 or ch. 977 is of the opinion that further appellate proceedings on behalf of the defendant would be frivolous and without an arguable merit within the meaning of Anders v. California, 386 U.S. 738 (1967), the attorney shall file with the court of appeals 3 copies of a brief in which is stated anything in the record that might arguably support the appeal and a discussion of why the issue lacks merit. The attorney shall serve a copy of the brief on the defendant, who may file a response to the brief within 30 days of service.

proceeding under the "no merit" rule. Mr. McCoy elected the third option.

Butler prepared a "no merit" brief raising four issues, referred to the transcript to demonstrate the factual or procedural grounds underlying them, cited authority defining the legal principles upon which the issues were based, and asserted the relief which would follow should the issues prevail on their respective merit. He also moved for permission to withdraw.

Butler did not, however, discuss why the issues he raised lacked merit. Instead, he expressly challenged the constitutionality of the requirement that he include such a discussion in the "no merit" brief. Butler filed a motion in the Wisconsin Court of Appeals seeking a determination of the constitutionality of

Rule 809.32(1) and a clarification of the scope of his representation, asserting that compliance with the "discussion" rule would be "directly contrary to Anders" and "unconstitutional." Further, he asserted that he could not "ethically take a position which would argue against his client or act as amicus curiae." See No Merit Brief of Defendant-Appellant.

The Wisconsin Court of Appeals, District I, denied that motion on the ground that a "no merit" brief had not yet been filed and no justiciable controversy existed. When Butler filed his "no merit" brief without a "discussion" of the demerits of his client's claims, the Court of Appeals struck the brief for noncompliance with Rule 809.32(1). Butler then petitioned the Wisconsin Supreme Court for review, seeking resolution of

the constitutional question and a declaration of Mr. McCoy's rights.

On May 8, 1985, the Wisconsin Supreme Court denied review on the ground that there was an adequate remedy at law in the Court of Appeals. After unsuccessfully renewing the motion to determine the constitutional question in the Court of Appeals, Butler filed an original action for a declaratory judgment in the Wisconsin Supreme Court. Review was granted on March 27, 1986. See Jurisdictional Statement, at 2.

On April 9, 1987, the Wisconsin Supreme Court held that the "discussion" rule was constitutional under Anders v. California, supra.[3/] Although the court acknowledged

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3/ See State of Wisconsin ex rel. Ellis T. McCoy v. Wisconsin Court of Appeals, Division I, 137 Wis. 2d 90; 403 N.W.2d 449 (1987).

that the "discussion" rule went beyond Anders,[4/] the court denied that the rule required counsel to brief the case against his client. Among other things, according to the court, the "discussion" rule "serves as a significant administrative aid to the reviewing court." State ex rel. McCoy, supra, n.3, 137 Wis. 2d at 103.

Appellant appealed to this Court. Probable jurisdiction was noted on October 5, 1987. ___ U.S. ___; 108 S.Ct. 63.

4/ The Court said: "The Wisconsin procedure goes beyond Anders and requires the attorney to file a brief which, in addition to articulating anything in the record which might support an appeal, includes a statement indicting why the appeal lacks merit." State ex rel. McCoy, supra, n.3, 137 Wis. 2d at 95.

I. THE WISCONSIN DISCUSSION RULE CONFLICTS WITH COUNSEL'S CONSTITUTIONAL ROLE AS AN ADVOCATE.

Amici curiae believe that the "no merit" brief filed by attorney Louis B. Butler, Jr., satisfied the requirements of Anders v. California, 386 U.S. 378 (1967). Butler made a partisan presentation of four issues and, by moving to withdraw, questioned whether the appeal was frivolous. His brief provided the appellate court with sufficient basis to decide whether the issues raised were, indeed, frivolous. Requiring counsel to discuss or state why the issues lack merit asks him to brief the appeal against his client, or perform as amicus curiae. We believe Wisconsin's "discussion" rule is unconstitutional under the Fourteenth Amendment of the United States Constitution.

The right to counsel on first appeal, recognized in Douglas v. California, 372 U.S. 353 (1963), requires counsel to examine the record, research the law, and marshall the arguments on behalf of the client. If, after conscientious evaluation of the record, counsel concludes that all issues are wholly frivolous counsel must file a brief referring to any arguable support in the record and give notice to the client. Anders v. California, 386 U.S. at 744. See also Pennsylvania v. Finley, 481 U.S. ___ (1987). This briefing requirement does "not force appointed counsel to brief his case against his client" but merely affords the client "that advocacy which a nonindigent defendant is able to obtain." Anders, 386 U.S. at 745. Counsel should not function as a friend of the court. "The consitutional requirement of

substantial equality and fair process can only be attained where counsel acts in behalf of his client, as opposed to that of amicus curiae." Id., at 744.

When counsel identifies "points" or "arguments" which appear to support the appeal, but which counsel deems to be frivolous, the brief must advance them, show what support they may have in the record and provide the court with authority defining the legal principles on which they are based.[5/] The Wisconsin rule requires counsel to do more -- to provide "a brief summary of any case or statutory authority which appears to support the attorney's conclusions, or a synopsis of those facts in the record which might compel reaching that same

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5/ See Swenson v. Bosler, 386 U.S. 258, 259 (1967).

result." State ex rel. McCoy, supra, n. 3, 137 Wis. 2d at 100. Counsel must advance, therefore, matters which do not support, but oppose, his client's interest in prevailing on the issue of frivolity.[6/] Moreover, the "discussion" rule requires counsel to advance "any" authorities that militate against his client's points. Counsel must, accordingly, research the case from the state's perspective. Such a responsibility conflicts with the well-settled obligation to serve as the client's advocate. Counsel should research the case with a view toward overcoming unfavorable authority that may

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6/ See LaFosse v. Walters, 585 F. Supp. 1209, 1213, n. 6 (S.D. N.Y. 1984) [Anders not satisfied where counsel's brief "was not submitted in an attempt to support his client's appeal but rather as a motion to withdraw"; held -- motion to withdraw erroneously granted].

be discovered. Where counsel researches the law as an advocate, and discovers both favorable and unfavorable authority, counsel should not cite unfavorable authority unless it is strictly necessary to do so to avoid misrepresentation.

Regarding references to the record, Anders requires counsel to refer "to anything in the record that might arguably support the appeal." This directive was calculated to prevent the reviewing court from having to sift through "only the cold record ... without the help of an advocate." Id., 386 U.S. at 744, 745. Anders required counsel to identify record support for the points advanced in order to avoid conclusory suggestions of frivolity, thus permitting the reviewing court to evaluate the factual basis of the claims advanced.

The Wisconsin "discussion" rule, by contrast, seeks to impose divided loyalties upon counsel, recruiting the individual's champion to "the mission that the State ... attempts to achieve." Polk County v. Dodson, 454 U.S. 312, 320 (1981). The "discussion" required of counsel serves only the state's convenience, forcing lawyers representing individual clients to do the work constitutionally assigned to states' attorneys on appeal.

II. THE WISCONSIN DISCUSSION RULE UPSETS THE BALANCE BETWEEN COUNSEL'S ROLE AS ADVOCATE AND COUNSEL'S PROFESSIONAL RESPONSIBILITY TO FOREGO FRIVOLOUS CLAIMS.

The ethical problems appointed appellate counsel confront are well-known. On the one hand, counsel must be an active advocate. Entsminger v. Iowa, 386 U.S. 748 (1967). On the other hand, "the canons of professional ethics impose limits on permissible advocacy." Polk County v. Dodson, 454 U.S. 312, 323 (1981).

This Court recognized this tension in Anders, supra. There, counsel filed with the reviewing court only a letter asserting that there was no merit in the appeal; there was no assertion that the appeal was wholly frivolous. This "bare conclusion" was based on counsel's reading

of the transcript and communication with his client. Although this Court did not specifically state that counsel had conscientiously investigated the appeal, it appears to have so assumed.[7/] The Court determined, however, that the California Supreme Court dismissed Anders' habeas corpus application without giving a reason for its decision. Thus the Court was unable to say that any state court had made a determination of frivolity or that counsel had acted "in any greater capacity than merely as amicus curiae." See Ellis v. United States, 356 U.S. 674 (1958). Anders, supra, at 743. The conclusory

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7/ "We are here concerned with the extent of the duty of a court-appointed appellate counsel to prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." Anders v. California, 386 U.S. at 739.

nature of counsel's presentation before the California courts, and the lack of any judicial finding of frivolity, generated this Court's holding: "California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity." Anders, supra, at 743.

The proper procedure, articulated in Anders, respects both the client's interest in effective advocacy in order that the appeal is dismissed only upon a judicial determination of frivolity and counsel's professional obligation to the court. In every case, counsel must file a brief identifying issues apparently available to the client and referring "to anything in the record that might arguably

support the appeal." Id., 744. Counsel must render to his or her client what may be the final service as advocate -- the presentation of arguments necessary to aid the reviewing court in determining the inaccuracy of counsel's suggestion that the appeal may be frivolous. If this procedural safeguard works as intended by Anders, the reviewing court will check ill-conceived conclusions by counsel, or conversely, it will independently verify the suggestion of frivolity through its own review, assuring that counsel has not overlooked a rational argument on the facts or law.[8/]

8/ See Coppedge v. United States, 369 U.S. 438, 448 (1962) [indigent federal prisoner must have appeal heard "if he makes a rational argument on the law or facts"; interpreting 28 U.S.C. 1915(d) and standard of frivolity contained therein. See also United States v. MacCollum, 426 U.S. 317 (1976).

Anders contemplates that the reviewing court not be left with "only the cold record" to review "without the help of an advocate," Anders, at 745. The reviewing court needs the assistance of counsel to argue for the continued viability of the appeal and against a finding of frivolity.[9/]

The purpose of the exercise is not to persuade the court that counsel should be allowed to withdraw -- there is no right of counsel to withdraw.[10/] Rather, the purpose of the procedure is (1) to allow the court, and not counsel, to decide the

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9/ Of course, the focus of the independent judicial review is exclusively on the issue of frivolity; the court should not reach the merits of any claims found not clearly frivolous.

10/ But see Commonwealth v. McClendon, 495 Pa. 467; 434 A.2d 1195 (1981).

issue of frivolity; (2) to protect the client's interest in continuing the appeal on full briefs and oral argument; while (3) protecting counsel from any subsequent sanctions for abusing the appellate process (were withdrawal not sought), by permitting notice to the court of counsel's suggestion of frivolity.

Under the Anders procedure, counsel is aided by both the opportunity to candidly communicate to the court a suggestion of frivolity and by the privilege of seeking guidance from the court on whether to proceed and how to do so. The client is protected by the court's independent review of the record to assure that the appeal is not clearly frivolous and that no rational claim of error has been overlooked. The client has an active advocate on the issue of nonfrivolity, and

the benefit of a burden of persuasion which does not require showing the likelihood of prevailing on the merits, but only that the appeal is not clearly frivolous. Moreover, the client has notice and opportunity to be heard on the question of frivolity. In short, the client has a "real chance ... of showing that the appeal has hidden merit." Douglas v. California, 372 U.S. at 356, and still enjoys representation by counsel functioning "in the active role of an advocate, as opposed to that of amicus curiae". Entsminger v. Iowa, 386 U.S. at 751 (1967); Ellis v. United States, 356 U.S. 674, 675 (1958).

Thus Anders provides that an attorney may suggest frivolity, seek guidance from the court, and advocate for a finding that the appeal is not clearly frivolous.

Thereafter, if the appeal proceeds to full briefing and oral argument on the merits, counsel is immune from any qualms prompted by his earlier doubts about the appeal's possible lack of merit because the appeal has been judicially certified as arguably meritorious.

In the case at bar Mr. Butler's good faith attempt to act as an advocate on behalf of his client is hindered by a state procedure which fundamentally warps his responsibilities. Counsel is effectively required, under Wisconsin's "discussion" rule, to abandon advocacy in his presentation to the court.

Anders, by contrast, requires a partisan presentation to the reviewing court. The duty of independent judicial review is exceedingly important, especially where counsel asserts that

there is nothing to advocate.[11/] That duty does not simply disappear once

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11/ The Constitution does not require that counsel do what is impossible. United States v. Cronic, 466 U.S. 648, 656, n. 19 (1984), citing Nickols v. Gagnon, 454 F.2d 467 (CA 7 1971), cert. denied, 408 U.S. 925 (1972). See also United States v. Camodeo, 383 F.2d 770, 772 (1967). Where courts are confronted with a brief asserting the lack of any irregularities which could be possible issues, the value of independent judicial review is at its zenith. The danger is that counsel may be inexperienced or untrained, or both, and will have missed a colorable issue. See Macon v. Lash, 458 F.2d 942, 946 (CA 7 1972) [inexperienced counsel]; and Nickols v. Gagnon, supra, 469 [analysis by a trained advocate]. While even experienced, trained counsel are not immune from such failure, even though they may rarely commit it, the court cannot rely on counsel's presentation alone to define the universe of possible claims that may arguably support a given appeal. However problematic, the possibility of the proverbial perfect trial must be weighed against the possibility of undiscovered issues of merit, overlooked by untrained, often young and inexperienced lawyers. The only real safeguard that exists under present law is the duty of truly

(Footnote Continued on Next Page)

counsel has presented issues rationally framed and accompanied by legal authority defining the underlying principles of law and "ready references" to the record facts supporting them. The court still must review the appeal for "hidden merit" which may exist quite apart from the points framed by counsel.[12/]

Hostility to the duty of independent judicial review may be understandable where counsel too quickly resorts to the the Anders procedure, thereby imposing upon the court inappropriate motions to withdraw which burden the court's already busy docket. Yet the remedy is to discourage motions to withdraw except

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(Footnote Continued From Previous Page)

independent judicial review of the appeal.

12/ Douglas v. California, 372 U.S. 353, 356, 358 (1963).

where the appeal is clearly frivolous. Otherwise, indigent appeals will "be used as a convenient valve for reducing the pressures of work on the courts." Coppedge v. United States, 369 U.S. 438, 459 (1962).

The Wisconsin Supreme Court held that there is a co-equal duty placed upon counsel to aid the court with a balanced evaluation of the appeal, and suggested that that requirement is neither sanctioned nor proscribed by Anders. State ex rel. McCoy, supra, n. 3, 137 Wis. 2d at 97, 98. This is a fundamental misconception.

CONCLUSION

Wisconsin's "discussion" rule cannot be reconciled with the goal of protecting the client's interest in continuing the

appeal. The "discussion" rule, in fact, conflicts with Anders in the most fundamental manner by redefining and limiting the principle of advocacy. If, by hypothesis, the "professional obligation to withdraw from frivolous appeals ... [is] be[ing] invoked with disproportionate frequency in cases involving indigent prisoners" Polk County, supra, 454 U.S. at 324, wide-spread adoption of state procedural rules patterned on Wisconsin's "discussion" rule will exacerbate the problems already facing ethical counsel. Increased mistrust and suspicion will surface and corrode the relationship between appointed counsel and indigent client, and the entire system of partisan advocacy will retrogress. The Wisconsin "discussion" rule, Rule 809.32(1), plainly violates the Fourteenth Amendment.

Respectfully submitted,

NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION
1625 K Street N. W.
Eighth Floor
Washington, D.C. 20006
(202) 452-0620

BY: KIM ROBERT FAWCETT
Counsel of Record

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 W. 43rd Street
New York, New York 10036
(212) 944-9800

AMERICAN CIVIL LIBERTIES
UNION OF WISCONSIN

By: JOHN A. POWELL
STEVEN R. SHAPIRO
LARRY W. YACKLE

Dated: November 16, 1987